FILE COPY

Supreme Court, U. S.
FILED
APR 23 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1191 .64

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT T. MCCRACKEN,
RALPH S. HARRIS,
Attorneys for Petitioner.

JOHN R. MCCULLOUGH,
of Counsel.

INDEX

	PAGE
Motion for leave to file petition for writ of certiorari	1
Petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit	3
Jurisdictional statement	4
Summary and short statement of the matter involved	5
Questions presented	32
Reasons relied on for the allowance of the writ	34
EXHIBITS ANNEXED TO THE PETITION	
EXHIBIT 1—Transcript of Hearing, June 5, 1941	38
EXHIBIT 2—Petition of Arthur C. Denison, J. Bernhard Thiess and Thorley von Holst, as *Amici Curiae*	68
EXHIBIT 3—Brief in support of Petition of Arthur C. Denison, J. Bernhard Thiess, and Thorley von Holst, as *Amici Curiae*	87
EXHIBIT 4—Petition of Arthur G. Logan as *Amicus Curiae*	96
EXHIBIT 5—Answer of Universal Oil Products Company to Petition and Brief of Arthur C. Denison, J. Bernhard Thiess and Thorley von Holst as *Amici Curiae*	102
EXHIBIT 6—Answer of Universal Oil Products Company to the Petition of Arthur G. Logan as *Amicus Curiae*	117
EXHIBIT 7—Reply Memorandum of Arthur C. Denison, J. Bernhard Thiess, and Thorley von Holst as *Amici Curiae* on the Filing of the Respondent's Answer to the Petition	119

PAGE

EXHIBIT 8—Reply Memorandum of Arthur G. Logan as *Amicus Curiae* 126
EXHIBIT 9—Answer to Reply Memorandum of *Amici Curiae* 133
EXHIBIT 10—Order, dated November 26, 1941 137
EXHIBIT 11—Transcript of Hearing, December 11, 1941 140
EXHIBIT 12—Transcript of Hearing, April 16, 1942 145
EXHIBIT 13—Memorandum Made by Master Upon Examining Certain Documents, etc. 185
EXHIBIT 14—Report of Thomas Raeburn White, Master, Sur Order of Reference of November 26, 1941 251
EXHIBIT 15—Order, dated June 15, 1944 358
EXHIBIT 16—Motion of *Amici Curiae*, for costs, expenses and counsel fees 360
EXHIBIT 17—Opinion, filed December 29, 1944 385
EXHIBIT 18—Order, dated December 29, 1944 392

TABLE OF CASES CITED

Holiday v. *Johnston*, 313 U. S. 342, 348, n. 2 5
In re Chetwood, Petitioner, 165 U. S. 443, 462 5
In re 620 Church St. Corp., 299 U. S. 24, 26 5
McClellan v. *Carland*, 217 U. S. 268 5
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117 5
Union Pac. R. R. Co. v. *Weld County*, 247 U. S. 282 5
United States Alkali Export Ass'n, Inc., et al. v. *U. S.*, U. S. , decided March 5, 1945 5
Universal Oil Co. v. *Globe Co.*, 322 U. S. 471 9

STATUTES CITED

Constitution of the United States, Article III, Sections 1 and 2 ..... 8, 18, 19, 29, 32, 33
Judicial Code, Section 240(a), (28 U. S. C. §347) 5
Judicial Code, Section 262 (28 U. S. C. §377) 1, 4, 5

IN THE

Supreme Court of the United States

October Term, 1944

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Universal Oil Products Company, by Robert T. McCracken and Ralph S. Harris, its attorneys, and respectfully moves this Honorable Court for leave to file the petition for writ of *certiorari*, hereto annexed, under Section 262 of the Judicial Code (28 U. S. C. §377), directed to the United States Circuit Court of Appeals for the Third Circuit to review an order of that court, entered December 29, 1944, more particularly described in said

petition, and for such other and further relief as to the Court may seem just and proper.

Dated: March 16, 1945.

ROBERT T. MCCRACKEN,
RALPH S. HARRIS,
Attorneys for Petitioner.

JOHN R. MCCULLOUGH,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1944

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, UNIVERSAL OIL PRODUCTS COMPANY, prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Third Circuit to review an order which the said Circuit Court of Appeals entered on December 29, 1944, as a result of an investigation conducted at the behest of certain attorneys, termed *Amici Curiae*, and captioned in a consolidated cause entitled *"Root*

Refining Company, Defendant-Appellant, vs. *Universal Oil Products Company, Plaintiff-Appellee*" and the power of said Court of Appeals to entertain jurisdiction in respect of said investigation and to enter said order or take any other action therein. Said order directed that *Amici Curiae* be allowed the sum of $100,000 as compensation for their services in the said investigation and the sum of $54,606.57 as expenses incurred by them in the said investigation and that the said sum of $154,606.57 be taxed against your petitioner, together with costs of the proceedings in that court.

A certified transcript of the record of the proceedings in the investigation, including the proceedings before said Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

JURISDICTIONAL STATEMENT

The order, of which review is sought, was entered on December 29, 1944 (Ex. 18, pp. 392-3, *infra;* v. IX, p. 3692)* and the jurisdiction of the said Court of Appeals, which is herein questioned, was assumed on June 5, 1941, and has continued to the present time.

Jurisdiction of this Court is invoked under Section 262 of the Judicial Code (28 U. S. C., §377). Grant of the common law writ of *certiorari,* as authorized by Section 262 of the Judicial Code, is sought to correct a continuing excess of jurisdiction by the Court of Appeals and in furtherance of justice in a question of public importance. See

*Where two record citations are given, the first reference is to the exhibits annexed to this petition, and the second is to the volume and page of the certified transcript of record filed with this Court.

United States Alkali Export Ass'n, Inc. et al. v. U. S., U. S. , decided March 5, 1945; *In re 620 Church St. Corp.*, 299 U. S. 24, 26; *Holiday* v. *Johnston*, 313 U. S. 342, 348, n. 2; *In re Chetwood, Petitioner*, 165 U. S. 443, 462; *McClellan* v. *Carland*, 217 U. S. 268; *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

Your petitioner has filed simultaneously with the filing of the motion for leave to file this petition, a petition for writ of *certiorari* under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C., §347) in order to preserve its right in the event this motion is denied. Your petitioner respectfully submits, however, that the writ should be issued under Section 262 since the issue before this Court will be the narrow one of whether or not the Court of Appeals had any jurisdiction in the instant proceeding to enter any order or decree whatever or to take any action whatever binding on your petitioner or affecting its property rights or judgments.

In the premises your petitioner respectfully prays that the motion for leave to file this petition under Section 262 be considered by this Court and acted upon prior to acting upon the companion petition under Section 240(a).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Your petitioner, Universal Oil Products Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business at 310 South Michigan Avenue, Chicago 4, Illinois. All of the stock and other securities of

petitioner are now owned by Guaranty Trust Company of New York, as Trustee,* under the terms of a deed of trust, dated October 26, 1944, for the creation of "The Petroleum Research Fund", the present named beneficiary thereof being the American Chemical Society; the income received from such trust by the beneficiary is to be used exclusively for advanced scientific education and fundamental research in the petroleum field; every patent, United States or foreign, that shall be taken out by or on behalf of the beneficiary or by or on behalf of any individual or institution acting at the direction of or on behalf of the beneficiary in carrying out such research is to be immediately dedicated to the public, royalty free.

The Judges of the Circuit Court of Appeals for the Third Circuit, purporting to act as the said Court of Appeals, have, as will hereinafter more fully appear, assumed jurisdiction, taken certain action, and entered certain orders wholly beyond the power and authority of them or any of them. The action taken, jurisdiction assumed, and orders entered purport to arise out of a consolidated cause entitled

---

*Since the acquisition of your petitioner's stock and other securities by Guaranty Trust Company of New York, as Trustee, as above set forth, a board of directors has been selected, wholly independent of and not beholden to any interests adverse to the purposes of said trust.

Your petitioner has for many years made available, at constantly voluntarily decreased license fees, the latest developments and discoveries in design, process and practice in the hydrocarbon field, particularly in the refining art, to all desiring the same. It has thereby enabled numerous refining companies, particularly the smaller companies, lacking their own experimental and laboratory facilities, to enjoy the advantage of the latest developments in the refining art and thereby to deal competitively with those petroleum companies possessing their own laboratories and development facilities.

"Root Refining Company, Defendant-Appellant, vs. *Universal Oil Products Company, Plaintiff-Appellee"* (hereinafter sometimes referred as "the *Root* case"), heard and determined on appeal in 1935 by the Circuit Court of Appeals for the Third Circuit; said action taken, jurisdiction assumed, and orders entered were all upon the application of one or more attorneys-at-law, namely, Arthur C. Denison, J. Bernhard Thiess, Thorley von Holst and Arthur G. Logan, described as *Amici Curiae*, none of whom was a party to or the attorney or representative of any party to that cause; indeed, that cause had been settled and had become wholly moot prior to the date upon which the said applications were made; nevertheless, as will hereinafter more fully appear, the said Judges, purporting to act as a Circuit Court of Appeals, assumed jurisdiction upon the petition of said attorneys, entered an order appointing a Master to investigate and report with respect to whether certain judgments in said consolidated cause were tainted by fraud, confirmed the Master's report finding that such judgments were so tainted by fraud, directed that they be set aside and said appeals be set down for reargument, and, most recently, based upon the foregoing action, entertained a petition by two of said attorneys, namely, J. Bernhard Thiess and Thorley von Holst, and made an order allowing said attorneys the sum of $100,000 as compensation for their services and the sum of $54,606.57 as expenses, and directing that the said sum of $154,606.57, together with costs in the said Court of Appeals, be taxed against your petitioner; said allowances and expenses having already been paid to said attorneys by their clients, the said payments constitute a reimbursement of said clients.

At the outset, we emphasize that the issue, which will be submitted to this Court if this writ is granted, is not whether or not the Master would have been justified, in a legally cognizable proceeding, in recommending that the *Root* judgments be set aside, or whether or not the Court of Appeals would have been justified, in a legally cognizable proceeding, in confirming the Master's report, adopting his findings of fact and conclusions of law, setting aside the *Root* judgments and entering the said order of December 29, 1944. Those questions should be reserved for determination in a proper proceeding constituting a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States, in which adverse parties appear before a legally constituted tribunal, in which the established rules of law are applied.*

Rather, as previously set forth, the issue before this Court will be the narrow one of whether or not the Court of Appeals had, or in the future will have, any jurisdiction in the instant proceeding to enter any order or decree or to take any action whatever binding upon your petitioner or affecting its property rights or judgments.

The *Root* case was a consolidation of two actions brought in 1929 and 1931, respectively, by your petitioner's predecessor in interest against Root Refining Company (hereinafter referred to as "Root") in the United States District Court for the District of Delaware, alleging infringement by Root of two of your petitioner's patents, namely, United States Letters Patent No. 1,392,629, Carbon P. Dubbs, granted October 4, 1921, and United

*We have confidence that in such a proceeding the *Root* judgments would not, and could not, be found to have been obtained by fraud.

States Letters Patent No. 1,573,592, Gustav Egloff, granted May 12, 1925.*

The *Root* case came on for trial in the District Court in 1932 before Honorable John P. Nields, District Judge, who, on April 27, 1934, rendered an opinion in favor of your petitioner sustaining the validity of the Dubbs and Egloff patents and finding that both patents were infringed by the accused Winkler-Koch process practiced by Root (6 F. Supp. 763). An interlocutory decree for an accounting and a permanent injunction was entered on that decision on May 18, 1934.

Appeals were taken by Root to the Circuit Court of Appeals for the Third Circuit and the cause was argued on January 7, 1935, before Circuit Judges Joseph Buffington, J. Warren Davis and J. Whitaker Thompson. The decree of the District Court was unanimously affirmed on June 26, 1935, by the Circuit Court of Appeals for the Third Circuit, with an opinion by Circuit Judge J. Warren Davis (78 F. [2d] 991). A petition for rehearing was filed in the Circuit Court of Appeals and was denied on August 6, 1935 (78 F. [2d] 991). A petition for a writ of *certiorari* was filed in this Court on September 3, 1935, and was denied on October 21, 1935 (296 U. S. 626).**

In February, 1936, your petitioner, pursuant to leave of the District Court, set up, by way of supplemental bills in the

*These patents have recently been the subject of an interpretation by this Court in *Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471.

**The transcript of the original consolidated cause was, by stipulation (v. VI, p. 2488), deemed a part of the record in the investigation hereinafter described and is on file with the Clerk of this Court (Nos. 417 and 418, October Term 1935; 296 U. S. 626). Your petitioner begs leave to refer thereto without the necessity of reprinting the same.

Root case, the assignment to it by its predecessor in interest of the Dubbs and Egloff patents and the claims for damages for the infringement thereof and was substituted as plaintiff in place of its predecessor in interest.

Thereafter and as of April 1, 1939, your petitioner and Root entered into a settlement of the controversy existing between them, whereby your petitioner waived its right to the accounting directed by the interlocutory decree, and your petitioner and Root entered into a license agreement granting Root the right to use certain of your petitioner's patents upon the payment of a stipulated license fee. The aforesaid settlement fully and completely disposed of the controversy between your petitioner and Root, although no order was entered dismissing the bill or vacating the injunction.

In 1941 Federal grand jury proceedings resulted in the indictment in the Eastern District of Pennsylvania of William Fox, the former motion picture magnate, former Circuit Judge J. Warren Davis, and one Morgan S. Kaufman, a Scranton, Pennsylvania, lawyer, charging an illegal conspiracy to obstruct justice in connection with William Fox's personal bankruptcy proceedings which had been commenced in the Third Circuit in 1936. William Fox pleaded guilty. Davis and Kaufman were tried twice, the jury upon each occasion disagreed, and after the second trial the indictment as to them was *nolle prossed*. At the first trial of Kaufman and Davis, testimony was adduced from which it appeared that the said Kaufman was retained by petitioner in 1932; that Kaufman was paid in the fall of 1935 by petitioner, as a general retainer for the years 1932, 1933, 1934 and a part of 1935, the sum of $25,000; that Kaufman was not an attorney of record in the *Root* case

and was not active in that case; and that shortly after he had been paid by petitioner said Kaufman loaned the sum of $10,000 to a cousin of Judge J. Warren Davis upon the security of a mortgage upon certain Florida real estate* (Ex. 1, pp. 47-9), *infra*; v. 1, pp. 9-11).

The late Arthur C. Denison,** J. Bernhard Thiess and Thorley von Holst had represented Root as attorneys of record in the *Root* case and in 1941 were representing several other refining companies, then using the Winkler-Koch process practiced by Root, against all of which suit had been brought by your petitioner for infringement of its Dubbs and Egloff patents; the said attorneys followed the proceedings in the criminal trial closely.

Under date of June 2, 1941, the said attorneys addressed the following letter to the late Thomas G. Haight, William F. Hall, Charles M. Thomas and Hugh M. Morris, counsel of record for your petitioner in the *Root* case (Ex. 1, pp. 39-40, *infra*; v. I, pp. 2-3):

> "Gentlemen:
>
> "Please be advised that on Thursday, June 5, 1941, at 3:30 P.M., Daylight Savings Time, we shall appear before the Judges of the Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, either in chambers or in the courtroom, as the Court may direct, and shall present to the Court the question of whether or not an investigation should be directed, in such manner as the Court may see fit, into the circumstances concerning the appeals

*It was subsequently conceded by *Amici Curiae* that the mortgaged real estate constituted adequate security for the loan.

**Judge Denison died on May 27, 1942. From and after this date *Amici Curiae* shall be deemed to refer only to Messrs. Thiess and von Holst, unless otherwise indicated by the context.

in the cases entitled *Root Refining Company* v. *Universal Oil Products Company*, Appeals Nos. 5648 and 5546, and the connection of Morgan S. Kaufman therewith, all as partially developed in the testimony taken in the case of *United States of America* v. *J. Warren Davis and Morgan S. Kaufman*, recently on trial in the United States District Court for the Eastern District of Pennsylvania.

"Our appearance before the Court will be on behalf of certain companies, including Globe Oil & Refining Company and Skelly Oil Company, against whom the decision in said case of *Root Refining Company* v. *Universal Oil Products Company* is being asserted as *res judicata* and as a judicial precedent.

"You are invited to attend if you see fit.

[Signed] Arthur C. Denison,
J. Bernard Thiess,
Thorley von Holst."

Pursuant to said letter, your petitioner's said counsel of record appeared in the courtroom of the Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, at 3:30 P. M. on June 5, 1941; upon the bench were all of the then active Circuit Judges for the Third Circuit. Presumably, said Arthur C. Denison, J. Bernhard Thiess and Thorley von Holst had arranged for said hearing, inasmuch as the hearing was opened by Judge Denison as follows (Ex. 1, p. 39, *infra*; v. I, p. 2):

"Mr. Denison: At Your Honors' suggestion, I will read the letter which is the only present basis of this application."

Thereupon Judge Denison proceeded to read the above quoted letter addressed to petitioner's counsel of record as an introduction to his further remarks.

After recounting the history of the *Root* litigation, Judge Denison described the aforesaid settlement between your petitioner and Root and stated that that settlement "completely disposed of the controversy" and that "the [*Root*] case had become moot" (Ex. 1, p. 43, *infra*; v. I, p. 6). He then described the legal position of himself and his co-applicants, as follows (Ex. 1, pp. 45, 46-7, *infra*; v. I, pp. 7-8, 9):

> "Now, I should explain a little more fully the situation of the counsel here today who signed this letter. We were counsel for the defendant in the Root case. In a nominal way perhaps we still are. But Root and Mr. Hamilton representing the Root Company settled that case and they have no further interest in it at present.
>
> "I may properly say that on consultation with Mr. Hamilton, he said that in view of the present contract he has with the plaintiff which in many respects is a desirable contract, he doesn't feel at liberty to his stockholders to ask to have that contract of settlement set aside.
>
> * * * * *
>
> "*While we do not represent the Root Company in making this suggestion to day,** we do represent some of these other people defendants as to whom it is claimed that the decree in the Root case is an adjudication, so that these other defendants can no longer deny either the validity or the infringement of the patent."

Although Judge Denison pointed out that petitioner was claiming that the *Root* judgments were *res adjudicata* as

*Italics supplied unless otherwise noted.

to his clients, he repudiated the claim, stating (Ex. 1, p. 52, *infra*; v. I, p. 14):

> "* * * we have always denied and we do deny, that there was that participation by them in the Root cases that made them really parties, and *we can't come in and say they were parties.*"

Judge Biggs inquired whether Judge Denison and his confreres were making an application to the court, to which Judge Denison replied (Ex. 1, pp. 51-2, *infra*; v. I, p. 13):

> "The frank answer to Your Honor's question is I don't know just what should be done. The Root case, itself, has been settled. As counsel for the Root Company we can't do anything. As counsel for these other companies against whom the thing is alleged to be an adjudication and which other companies the plaintiff claims were really defendants in this case—as representing those companies we could file a formal application, I suppose."

Counsel for your petitioner thereupon offered to consent, on behalf of your petitioner, to a reargument of the *Root* case on the merits before the Court of Appeals as then constituted,* provided Root would appear and reargue. Mr. von Holst, one of Judge Denison's associates, responded to this offer as follows (Ex. 1, p. 65, *infra*; v. I; pp. 25-6):

> "On the question of re-argument in so far as it bears on the Root situation, I was in conference with Mr. Hamilton of the Root Company lately, and they settled their litigation after long years of costly litigation, and their position, of course, is that they would not want to jeopardize their present position.

*At that time, each of the Circuit Judges for the Third Circuit who were in office in 1935 had either retired or resigned.

"In other words, the Root Company would not for a moment consent to throwing the whole thing open again and taking their chances on a new adjudication where they might win or they might lose, and I did not understand Judge Haight's offer of a re-argument to include a statement if the decision went against Root again, that then Root would be secure in the settlement which they made in 1939, and, of course—

"Mr. Haight: We will give them that.

"Mr. von Holst: With that understanding, of course, the situation is changed to that extent. My only position on that would be that there is no counsel present here authorized to speak on behalf of Root at this time in response to Judge Haight's offer. Otherwise, I don't change or modify anything that has been said heretofore, *because we do not, as we made plain in the opening, represent the Root Company before Your Honors.*"

At the conclusion of the hearing, Judge Biggs stated (Ex. 1, p. 67, *infra*; v. I, p. 27):

"We think, Judge Denison, that you should embody in a written motion or a petition so that it may be formally on the records of this Court whatever relief it is that you seek, or what you desire by way of prayer or motion to have this Court do, and then the other side of the controversy may make an appropriate reply, and the whole matter may be one of record in which the Court may determine the issue."

Pursuant to this suggestion, Messrs. Denison, Thiess and von Holst filed, under date of June 18, 1941, a written petition as *Amici Curiae* (Ex. 2, pp. 68-86, *infra*; v. I, pp.

29-46) and a brief in support thereof (Ex. 3, pp. 87-95, *infra;* v. I, pp. 46-54).

Under date of June 25, 1941, one Arthur G. Logan,* another of the counsel of record for Root in the *Root* case until the time of the execution of the aforementioned settlement agreement and who was then attorney for Eastern States Petroleum Co., Inc., another licensee of your petitioner, filed a petition as *Amicus Curiae,* in which, after setting forth, among other things, the alleged interest of Eastern States Petroleum Co., Inc., he joined in the prayers set forth in the petition of Messrs. Denison, Thiess and von Holst (Ex. 4, pp. 96-101, *infra;* v. I, pp. 55-60).

Under date of July 9, 1941, your petitioner filed answers to the petitions of said *Amici Curiae* (Exs. 5 and 6, pp. 102-18, *infra;* v. I, pp. 61-76). *Amici Curiae* filed reply memoranda thereto (Exs. 7 and 8, pp. 119-32, *infra;* v. I, pp. 77-89), to which petitioner filed an answer (Ex. 9, pp. 133-6, *infra;* v. I, pp. 90-3).

Under date of November 26, 1941, the said Judges, purporting to act as the Circuit Court of Appeals for the Third Circuit, entered, upon the said application of *Amici Curiae,* an order (Ex. 10, pp. 137-9, *infra;* v. I, pp. 94-6) captioned in the said consolidated cause entitled *"Root Refining Company, Defendant-Appellant,* vs. *Universal Oil Products Company, Plaintiff-Appellee"*, in which one Thomas Raeburn White, Esq., was appointed Master,

> "with authority to examine, investigate and to make and report to this court his findings and conclusions

*Mr. Logan had also appeared at the June 5, 1941, hearing and generally concurred in the position taken by *Amici Curiae.*

concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman, and former Circuit Judge J. Warren Davis, and any and all persons acting for or on behalf of any of them in connection with the above entitled causes and the entire subject matter of the prosecution and disposition of the said causes and in particular whether there was in connection therewith such fraud, corruption, obstruction, or distortion of justice as tainted and invalidated the judgments rendered by this court in the above entitled causes on June 26, 1935."

The order also directed the Master (Ex. 10, p. 138, *infra*; v. I, p. 95):

"to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadelphia took place, to make available to him as an officer of this court a stenographic transcript of the said proceedings."

Said order of November 26, 1941, was not entered in any case or controversy between adverse parties then pending before the said Court of Appeals, within the meaning

of Article III, Sections 1 and 2 of the Constitution of the United States.

There were not then and are not now and have not been, at least since April 1, 1939 (the date of the settlement between Root and your petitioner), any adverse parties* in the cause entitled *"Root Refining Company, Defendant-Appellant,* vs. *Universal Oil Products Company, Plaintiff-Appellee"*, between which there existed a case or controversy capable of judicial determination by a court of the United States.

---

*At the hearing on June 5, 1941, above described, Judge Denison was careful to explain that neither he nor his associates nor their clients were parties to the *Root* case. Judge Biggs inquired (Ex. 1, p. 52, *infra*; v. I, p. 14):

> "Judge Denison, in order that we may have this situation formally before us, you do represent certain persons who are directly concerned in the Root Refining case, the two cases to which you have referred; is that correct?"

To this Judge Denison replied (*ibid.*):

> "That is part of the truth. We have always denied on account of these other defendants—*we have always denied and we do deny that there was that participation by them in the Root cases that made them really parties, and we can't come in and say they were parties.*"

To the suggestion of Judge Biggs that Judge Denison and his confreres might "have a right to proceed in this matter amicus curiae", Judge Denison responded (Ex. 1, p. 53, *infra*; v. I, pp. 14-5):

> "* * * but I know of no precedent for it, and such proceedings ordinarily are applications for a re-argument of the case, itself, and that very case is out of existence, it has been settled. That is the complication there. The problem is a difficult one."

The investigation* directed by the said order of November 26, 1941, and conducted by the Master appointed thereby, did not constitute a case or controversy within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States and presented no justiciable controversy between adverse parties capable of judicial determination by a court of the United States.

At the first hearing before the Master, on December 11, 1941 (Ex. 11, pp. 140-4, *infra*; v. I, pp. 97-101), no testimony was taken, but the Master advised counsel that he would endeavor to obtain access to the records described in the said order dated November 26, 1941.

Pursuant to the purported authority contained in the order of November 26, 1941, the Master thereafter personally examined, in the office of the United States Attorney for the Southern District of New York, all of the records in the possession of that official, including, among others, the report of an investigator of the Federal Bureau of Investigation, bank records, statements made by Judge Davis' cousin, the latter's son, and Judge Davis himself; also written statements prepared and submitted to the United States Attorney by Davis, his wife and his counsel,

---

*The Master recognized the proceeding to be a mere investigation, for he stated at the second hearing before him (Ex. 12, p. 177, *infra*; v. I, p. 133):

> "Well, I think as realists we must recognize, of course, that you gentlemen on either side have private interests that you are serving as well as the public interest.
>
> "On the other hand, the primary interest of the Court, I think, was public interest to make sure that its decision in this case had been, as it said, not tainted with fraud.
>
> "I do not think that the *investigation—for that is all it is—should be conducted strictly according to the rules of evidence in litigation.*"

the grand jury testimony of Davis and Kaufman, and "many other reports and statements" (Ex. 12, p. 153, *infra;* v. 1, p. 110),—all for the purpose of ascertaining if anything was contained in them which, he thought, might throw light upon the matters then under investigation. The Master made extracts of "all matters which seem to me to be material to the present investigation" (Ex. 12, p. 156, *infra;* v. I, p. 113).

Upon the conclusion of his said independent investigation, the Master submitted for the examination of *Amici Curiae* and counsel for your petitioner the portions of the material above described which he had examined and which he had determined "might throw any light upon the issues raised in the present investigation" (Ex. 12, p. 152, *infra;* v. I, p. 109).

At the second hearing, on April 16, 1942 (Ex. 12, pp. 145-84, *infra;* v. I, pp. 102-39), the Master read into the record a list and description of the documents, records, grand jury testimony, F. B. I. reports and other writings which he had examined and some of which he had submitted to counsel.

At the same hearing, the Master advised counsel that he had (Ex. 12, p. 156, *infra;* v. I, pp. 113-4)

> "procured a copy of the record of the Grand Jury sitting in Philadelphia which investigated the affairs of Judge Davis and Mr. Kaufman, but I have not yet had an opportunity to examine it. I have agreed with Judge Biggs that I would examine this record, and if I found anything in it material to the present inquiry it should be used in this proceeding. If I find nothing which seems to me to have a bearing on the issues presented in this inves-

tigation, I will return the record to the proper parties.".

Following the Master's description of his own investigation and what he proposed to do with respect to grand jury proceedings in Philadelphia, application was made by the *Amici Curiae* for the issuance of subpoenas *duces tecum* (Ex. 12, pp. 157-63, *infra;* v. I, pp. 114-20).

In the course of the discussion which followed of the powers of the Court of Appeals and the Master and of the purposes of the order of November 26, 1941, counsel for your petitioner cogently stated petitioner's position with respect to the investigation as follows (Ex. 12, pp. 164-6 *infra;* v. I, pp. 121-3):

> "Mr. Harris: * * * To the extent that the amici curiae are really litigants, or to the extent that any finding by His [Your] Honor or by the Circuit Court of Appeals might affect property or other rights of Universal Oil Products Company, or in any wise affect the merits of the two Root cases, although we entertain in our own minds no doubt as to the propriety of everything which has transpired and that will be duly shown, nevertheless, we feel we should be somewhat derelict in our duties to our client if we did not make upon the record an objection to the jurisdiction of the Circuit Court of Appeals, and, consequently, of Your Honor, to hear and determine in a summary and informal manner, and in a proceeding which doesn't amount to a controversy or suit prescribed by the Constitution of the United States, matters which affect or might affect property rights of our client and a judgment in its favor in the Court in this circuit.
>
> "* * * and therefore, purely for the sake of

advising Your Honor and counsel, [1] formally object in so far as this proceeding is other than an investigation by the Court looking toward vindication of the Court's honor, or otherwise; object that the Court is without jurisdiction to take testimony or to take any action, and that the order under which these hearings are held is likewise without jurisdiction, and without going into the details I urge that the investigation and order are not made in a case or controversy, as that case is defined in Sections 1 and 2, Article 3, of the Constitution of the United States.

"That there are not now before the Court or the Special Master any adverse parties so that any case or controversy can be said to exist.

"That there is not now before the Special Master any justiciable controversy over which the Circuit Court of Appeals or the Special Master has jurisdiction.

"That the persons designated in the order of the Circuit Court of Appeals herein as friends of the Court are not adverse parties technically, and have no standing as adverse parties in the cases of Root Refining Company, Defendant-Appellant against Universal Oil Products Company, Plaintiff-Appellee, Nos. 5546 and 5648.

"That the order of the Circuit Court of Appeals herein and hearings before the Special Master are beyond the jurisdiction of the Circuit Court of Appeals because the cases above referred to were disposed of by the Circuit Court of Appeals at a term other than the term at which the order herein was made, and, finally, that the Circuit Court of Appeals at the time when the order herein was made had no jurisdiction whatever in the cases above

referred to, because the term in which said Court had decided said cases and handed down its mandate had previously come to an end, and these objections I make without limiting the generality of my general objection."

Following the foregoing colloquy and statements of objection to jurisdiction, the Master observed that the "investigation" should not "be conducted strictly according to the rules of evidence in litigation" (Ex. 12, p. 177, *infra;* v. I, p. 133).

Notwithstanding this lack of jurisdiction, the Master directed that the hearings proceed and that subpoenas issue at the request of the *Amici Curiae.*

Commencing on the 12th day of May, 1942,* and continuing from time to time thereafter until April 2, 1943, hearings were held before the Master, at which witnesses, called exclusively by *Amici Curiae,* were interrogated and numerous exhibits offered and received in evidence. During the course of the hearings, a transcript of much of the testimony adduced in the criminal trials entitled *"United States of America* v. *J. Warren Davis and Morgan S. Kaufman",* to which your petitioner was not a party, was received in evidence, as was a transcript of the testimony given by various witnesses, including a part of the testimony of the Honorable John Biggs, Jr., Senior Circuit Judge, before Federal grand juries either in New York or in Philadelphia. From time to time petitioner noted its

*Mr. Logan did not participate in the investigation after May 12, 1942.

objection* to the non-judicial procedure adopted by the Master in so far as the proceedings purported to furnish a basis for any adjudication binding upon your petitioner or which would affect its property rights or judgments."

---

*Addressing himself to the independent investigation by the Master, counsel for the petitioner noted the following objection upon the record (Ex. 12, pp. 166-7, *infra*; v. I, pp. 123-4):

> "Mr. Harris: * * * Now that our objections may be said to have substance, I should point out that under the order, I take it Your Honor may make your own investigation, may consider proceedings before the Grand Jury both in New York and here, and may make such further and other investigation as to Your Honor seems proper. I think that is entirely proper in such a proceeding, to inquire into the honor of those previously sitting on this Court.
>
> "However, if it were to involve any property rights of our clients, including the validity of any judgment, then, of course, none of this evidence would be admissible in a plenary action. We would have a right to require it to be sworn to and delivered in open court with an opportunity for cross-examination, and all the rights which litigants are guaranteed in a controversy or case under the Constitution of the United States."

Later in the proceeding, when the testimony of one Behrens before the Federal grand jury was offered in evidence, the following colloquy took place (v. I, p. 250):

> "Mr. Harris: With the understanding previously noted, which I understand holds good all through the hearing without further notation, that while we welcome this informal method of producing proof for the purpose of an investigation of the probity of the Court, we do not recognize it as binding on Universal Oil Products Company in so far as it may affect any rights or property it may have. This is not a proper proceeding for that.
>
> "Mr. Thiess: There has been a general exception to this on the record at the present time.
>
> "The Master: That is understood."

Subsequently, the Master caused to be filed as a part of the record of the investigation, a memorandum (Ex. 13, pp. 185-250, *infra*; v. VI, pp. 2240-2306) describing in further detail certain of the documents which he had examined in the office of the United States Attorney for the Southern District of New York and setting forth extracts from the testimony of Morgan S. Kaufman and J. Warren Davis before the Federal grand jury there. These extracts were interspersed with running comments of the Master. Though not a part of said memorandum, the Master also caused to be included in the record of the investigation, the testimony of Judge Davis' cousin before the Federal grand jury in New York. (v. VI, pp. 2306-2487).

At the conclusion of the hearings before the Master, briefs and proposed findings of fact and conclusions of law were submitted by *Amici Curiae* and by counsel for your petitioner (Ex. 14, pp. 289-342, *infra;* v. VIII, pp. 3551-3600). In its brief, counsel for your petitioner again challenged the jurisdiction of the Court of Appeals and of the Master by requesting the following conclusion of law (Ex. 14, p. 339, *infra;* v. VIII, p. 3596):

> "The instant proceeding does not constitute a case or controversy within the meaning of Article III, Section 1 of the Constitution."

This conclusion the Master refused (*ibid.*).

After a consideration of the issues, the Master rendered a report (Ex. 14, pp. 251-342, *infra;* v. VIII, pp. 3516-3600) in which he concluded (Ex. 14, p. 288, *infra;* v. VIII, p. 3550):

> "Upon the whole record I am forced to the conclusion that there was in connection with this case

such fraud as tainted and invalidated the judgments rendered by this court therein on June 26, 1933."

The ultimate conclusion of the Master was reached purely by inference. There was no direct evidence either that Judge Davis was bribed or improperly influenced in any way in his decision in the *Root* case or that your petitioner was in any wise connected with any fraudulent conduct or had any knowledge of the loan to Judge Davis' cousin. In the last analysis, the Master may have been influenced to a great extent (a) by his examination of unsworn records in the office of the United States Attorneys who were prosecuting Davis, Fox and Kaufman, and (b) by a consideration of the alleged dealings between Davis, Fox and Kaufman in the Fox bankruptcies which were unknown to your petitioner and which occurred a year after the decision in the *Root* case, the payments by petitioner to Kaufman, and Kaufman's loan to Judge Davis' cousin. During the pendency of the investigation, an atmosphere of disgust pervaded the Philadelphia bench and bar as a result of the disclosures in connection with the Fox bankruptcy. It is difficult, therefore, to imagine that the Master could have been unaffected by this atmosphere.

Under date of November 20, 1943, your petitioner filed appropriate objections and exceptions to the Master's report (v. VIII, pp. 3615-37).

By an order, dated February 28, 1944, the Court of Appeals directed that a hearing be had upon the question of the confirmation or rejection of the report of the Master. Briefs were exchanged and oral argument heard and, under date of June 15, 1944, the Court of Appeals entered an order, captioned "*Universal Oil Products Company* v. *Root*

Refining Company, Appellant" which provided, in part, as follows (Ex. 15, p. 359, *infra*; v. IX, p. 3662):

> "Upon consideration thereof the Court hereby dismisses the exceptions and adopts the findings of fact and conclusions of law of the Special Master as the findings of fact and conclusions of law of the Court.
>
> "And it is ordered that the judgments of this Court in the above entitled causes entered on June 26, 1935 be and the same are hereby vacated and that the mandates issued on October 30, 1935 to the District Court be recalled. The Clerk is directed thereupon to restore the causes to the argument list for reargument."

The causes have never been reargued pursuant to that order.

On or about July 24, 1944, J. Bernhard Thiess and Thorley von Holst, as *Amici Curiae*, made an application captioned in the *Root* case for an order directing (Ex. 16, pp. 360-1, *infra*; v. IX, pp. 3663-4):

> "1. That the expenses and compensation of Thomas Raeburn White, Special Master, acting under the Order of this Court entered November 26, 1941, paid by the *Amici Curiae* in the first instance and allowed to the Master by the Order of this Court entered December 14, 1943, be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $28,481.91.
>
> "2. That the costs and disbursements paid by the said *Amici Curiae* during the course of the investigation by the Master under the Order of November 26, 1941, be taxed against Universal Oil Products

Company and in favor of said *Amici Curiae* in the amount of $15,488.20.

"3. That the other and additional expenses incurred by the *Amici Curiae* during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $11,997.87, or such part thereof as the Court may deem proper.

"4. That a reasonable attorney's fee on account of the services of the said *Amici Curiae* and of counsel associated with them during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae*.

"5. That the Court set a day certain for the hearing of this Motion."

Upon the return of said motion, *Amici Curiae* stated that they had received from certain of their corporate clients, not including Root, the expenses, costs, disbursements and counsel fees, which were the subject of their motion, and that such fees, costs and allowances as might be granted to them would serve to reimburse their clients for such expenditures.

Upon the oral argument of the aforesaid motion and in the briefs submitted by counsel for the petitioner in opposition thereto, your petitioner again challenged the jurisdiction of the Court of Appeals to act in the premises and to enter any judgment against your petitioner in favor of *Amici Curiae* or their clients, upon the ground that the proceedings, while captioned in the said consolidated cause entitled *"Root Refining Company, Defendant-Appellant,* vs. *Universal Oil Products Company, Plaintiff-Appellee"*, did

not constitute a case or controversy within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States; that there were no adverse parties; that there was no justiciable controversy; and that the above entitled cause was moot.

Under date of December 29, 1944, the Judges of the Court of Appeals handed down opinions granting the motion of *Amici Curiae*, with the exception of a small item of $1,361.41 representing expenditures made by *Amici Curiae* prior to the date of the order appointing the Master (Ex. 17, pp. 385-91, *infra;* v. IX, pp. 3685-91). The majority (the Honorable John Biggs, Jr., Herbert F. Goodrich and Gerald McLaughlin) held that (Ex. 17, p. 389, *infra;* v. IX, p. 3689):

> "Accordingly *amici* and their associates will be allowed the sum of $100,000 as their reasonable compensation and the amount of $54,606.57 as reimbursement for their out-of-pocket expenses."

The minority (the Honorable Charles Alvin Jones and Albert Branson Maris) held that the allowance to *Amici Curiae* as compensation for their services in the investigation should be limited to an amount equal to the fee paid the Special Master, namely, $25,000 (Ex. 17, pp. 389-91, *infra;* v. IX, pp. 3689-91).

The said opinions make no comment and contain no discussion of the subject of jurisdiction, except the following in the majority opinion (Ex. 17, p. 388, *infra;* v. IX, p. 3688):

> "The members of the court are agreed that the court has power to award the compensation for their services to the court, to be paid by the plaintiff, and that under the circumstances of this case

the *amici* are entitled to be awarded reasonable compensation for those services."

Under date of December 29, 1944, the Court of Appeals entered an order directing "that the sum of $154,606.57 be and the same hereby is taxed against Universal Oil Products Company together with the costs of the proceedings in this Court to set aside the judgments rendered by this Court in the above entitled causes [the *Root* case] on June 26, 1935", (Ex. 18, pp. 392-3, *infra*; v. IX, pp. 3692-3).

Since the entry of the order of December 29, 1944, said *Amici Curiae* have proposed that the Court of Appeals enter a further order in said investigation, directing the dismissal of the *Root* case by the District Court as moot. The Clerk of the Court of Appeals has notified your petitioner that the members of that court have in mind the possibility of a direction to the District Court to dismiss said *Root* case for unclean hands.

Since the entry of the order of June 15, 1944, one of petitioner's former licensees, to wit, Eastern States Petroleum Co., Inc., which is represented by said Arthur G. Logan, Esq., has instituted suit in the Chancery Court of the State of Delaware, in which it has alleged that it was induced to enter into a license agreement as a result of representations by your petitioner that the judgment of the Circuit Court of Appeals for the Third Circuit in the *Root* case was a valid judgment. The order of June 15, 1944, is therein alleged to be an adjudication of the issue of fraud binding upon your petitioner.

Skelly Oil Company recently made an application to the Circuit Court of Appeals for the Third Circuit in an action entitled "*Universal Oil Products Company* vs.

Skelly Oil Company" for an order recalling the mandate issued by said Circuit Court of Appeals in that case, affirming a decree of the District Court finding infringement and ordering an accounting, and for the issuance of a new mandate directing the District Court, among other things, to enter final judgment, denying to plaintiff any recovery of profits or damages, upon the ground that your petitioner had, by citing the decision in the *Root* case as a judicial precedent to the Master who conducted the accounting, been guilty of unclean hands. Skelly merely proved the entry of said order of June 15, 1944, without attempting to prove the invalidity of the *Root* judgments. The Circuit Court of Appeals denied the said relief but granted leave to the District Court to consider the alleged fraud in the *Root* case in relation to the relief sought in the *Skelly* case. Skelly has applied to the District Court in accordance with the leave granted to the District Court and that proceeding is pending before the Honorable John Biggs, Jr. sitting in the District Court.

Several other of your petitioner's licensees have threatened to bring actions against your petitioner to attempt to rescind license agreements entered into with it and to recover the license fees paid thereunder, upon the ground that they were induced to enter into such license agreements by alleged fraudulent misrepresentations upon the part of your petitioner as to the validity of the judgments of the Circuit Court of Appeals for the Third Circuit in the *Root* case. In such cases, your petitioner is informed and believes that such claimants propose to rely merely on said order of June 15, 1944, to prove fraudulent inducement.

In the premises, all such licensees should be required to establish the invalidity of the *Root* judgments, if they

be invalid, through the presentation of competent, legal evidence offered and received in a recognized judicial proceeding, before such invalidity should be held to be binding upon your petitioner.

Your petitioner does not seek, by a mere legal technicality, to be relieved of the just penalty of any fraud of which it has been proven to be guilty; it has not been found guilty by due process of law. Indeed your petitioner believes that in a legally constituted proceeding, where the ordinary rules of evidence were observed, where an atmosphere of hostility were lacking, and where the party charging fraud were obliged to prove that charge by a fair preponderance of the evidence and, above all, where the trier of the fact would not have access to sources of information denied to your petitioner,—no finding of fraud or corruption touching your petitioner could be made. Your petitioner respectfully submits that it is entitled, before the odium of corrupting the judiciary and all the concomitants thereof (such as charges in other proceedings of unclean hands) attach to it, to have a plenary trial of the issues in accordance with established legal principles. It has not had such a trial to date.

QUESTIONS PRESENTED

1. Did the instant investigation constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States so as to permit the Court of Appeals to enter any decree or order or take any action of any nature whatsoever therein binding upon your petitioner or affecting its property rights or judgments.

2. Did *Amici Curiae*, participating in the instant investigation as purported friends of the court, constitute adverse parties within the meaning of Article III, Section 2, of the Constitution of the United States.

3. Did the Court of Appeals have jurisdiction to enter the order of December 29, 1944.

4. Did the Court of Appeals have jurisdiction to enter in the instant proceeding any decree or order or take any action of any nature binding upon your petitioner as a result, or as a part, or in pursuance, of an investigation in a cause which had been rendered moot by reason of the settlement thereof by the parties thereto, particularly since the former, actual and only adverse party failed and refused to appear or participate, but, on the contrary, signified to that court its desire that the finality of the case be undisturbed.

5. Did the Court of Appeals have jurisdiction to allow to *Amici Curiae* the compensation and expenses specified in the order of December 29, 1944, and to direct that the same be taxed against petitioner.

6. Did the entry of the order of December 29, 1944, as a result of an investigation in which the established rules of evidence were disregarded, deprive petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

7. May the Court of Appeals continue to assert jurisdiction and take any further action in said investigation binding upon your petitioner or affecting its property rights or judgments.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Exercise of the power of this Court to grant the writ of *certiorari* herein prayed is sought upon the following grounds:

1. The Court of Appeals, in assuming jurisdiction of the instant proceeding which did not constitute a case or controversy, acted in a manner which is untenable and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

2. The Court of Appeals, in assuming jurisdiction of the instant proceeding in which there were no adverse parties asserting adverse, legally cognizable interests, acted in a manner which is untenable and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

3. The Court of Appeals, in assuming jurisdiction of the instant investigation, although the cause in which it was conducted had become moot by reason of a settlement agreement entered into between the parties thereto, acted in a manner which is untenable and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

4. The Court of Appeals was wholly devoid of any jurisdiction or power to direct the payment by your petitioner of compensation to and the expenses of *Amici Curiae*, and the action of said Court of Appeals in entering the order directing such payment is in conflict with the ap-

plicable decisions of this Court and of other Circuit Courts of Appeal.

5. The question of whether the Court of Appeals, in an investigation in which the recognized rules of evidence were disregarded and which was conducted in a proceeding to which there were no adverse parties asserting adverse, legally cognizable interests, had jurisdiction to enter orders binding upon petitioner and purporting to affect its property rights or judgments, is one of great public importance and should be resolved by this Court.

6. The action of the Court of Appeals in entering the order of June 15, 1944, which vacated the prior judgments of that court, recalled its mandate and directed a reargument of the *Root* case, and which purported to afford a basis for the entry of the order of December 29, 1944,—all in an investigation conducted in disregard of the established rules of evidence—is untenable and is probably in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the investigation conducted in the consolidated cause numbered and entitled in its Docket Nos. 5648 and 5546, Root Refining Company, Defendant-Appellant, vs. Universal Oil Products Company,

Plaintiff-Appellee, and that said order of the Circuit Court of Appeals for the Third Circuit, entered December 29, 1944, may be reversed by this Court and that your petitioner may have such other and further relief in the premises as to this Court may seem just; and your petitioner will ever pray.

March 16, 1945.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

By: THOMAS W. BOWERS,
Chairman of the Board of Directors,
ROBERT T. MCCRACKEN,
RALPH S. HARRIS,
Attorneys for Petitioner.

JOHN R. MCCULLOUGH,
of Counsel.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS W. BOWERS, being duly sworn, deposes and says: that he is Chairman of the Board of Directors of Universal Oil Products Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief.

THOMAS W. BOWERS

Sworn to before me this
16th day of March, 1945.

EDITH STENBERG

EDITH STENBERG, Notary Public, Nassau Co.
Nassau County Clerk's No. 1815, Kings County
Clerk's No. 335, Kings County Reg. No. 571-S-6
N. Y. Co. Clk's No. 1304, N. Y. Co. Reg. No. 767-S-6
My Commission expires March 30, 1946

EXHIBIT 1

Transcript of Hearing, June 5, 1941

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY,

Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,

Appellee.

Before:

Hon. JOHN BIGGS, JR.
Hon. ALBERT BRANSON MARIS
Hon. WILLIAM CLARK
Hon. CHARLES ALVIN JONES
Hon. HERBERT F. GOODRICH

Philadelphia, Pa., Thursday, June 5, 1941.

Present:

ARTHUR C. DENISON, Esq. (Cleveland, Ohio).
ARTHUR G. LOGAN, Esq. (Wilmington, Delaware).
THORLEY VON HOLST, Esq. (Chicago, Illinois).
J. B. THIESS, Esq. (Chicago, Illinois).
RICHARD E. DWIGHT, Esq. (New York City).
THOMAS G. HAIGHT, Esq. (Jersey City, New Jersey).
HUGH M. MORRIS, Esq. (Wilmington, Delaware).
WILLIAM F. HALL, Esq. (Washington, D. C.).
CHARLES M. THOMAS, Esq. (Washington, D. C.).
EDWARD J. O'MARA, Esq. (Jersey City, New Jersey).

Mr. Denison: At Your Honors' suggestion, I will read the letter which is the only present basis of this application. The letter is addressed to Messrs.:

"Thomas G. Haight, Esq.,
15 Exchange Place,
Jersey City, N. J.
William F. Hall, Esq.,
Victor Building,
Washington, D. C.
Charles M. Thomas, Esq.,
Shoreham Building,
Washington, D. C.
Hugh M. Morris, Esq.,
3018 DuPont Building,
Wilmington, Delaware.

Gentlemen:

Please be advised that on Thursday, June 5, 1941, at 3:30 P. M., Daylight Savings Time, we shall appear before the Judges of the Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, either in chambers or in the courtroom, as the Court may direct, and shall present to the Court the question of whether or not an investigation should be directed, in such manner as the Court may see fit, into the circumstances concerning the appeals in the cases entitled *Root Refining Company* v. *Universal Oil Products Company*, Appeals Nos. 5648 and 5546, and the connection of Morgan S. Kaufman therewith, all as partially developed in the testimony taken in the case of *United States of America* v. *J. Warren Davis and Morgan S. Kaufman*, recently on trial in the United States District Court for the Eastern District of Pennsylvania.

Our appearance before the Court will be on behalf of certain companies, including Globe Oil &

Refining Company and Skelly Oil Company, against whom the decision in the said case of *Root Refining Company* v. *Universal Oil Products Company* is being asserted as *res judicata* and as a judicial precedent.

You are invited to attend if you see fit."

Signed, "Arthur C. Denison,
J. Bernhard Thiess,
Thorley von Holst."

The situation seems to us to have a double aspect, one of which pertains to certain legal rules, and rights, and remedies, and the other of which pertains to a matter much deeper, as is here indicated, as touching perhaps a former member of this Court and his connection with the case referred to which we call the Root case. I will speak, first, of the first aspect so that Your Honors may have a general knowledge of what this Root case was and what has happened in it and about it quite disconnected from the second aspect of the case.

In the District Court of Delaware an ordinary infringement case based upon a patent called the Egloff Patent was commenced in 1928, and another case based on the Dubbs Patent was commenced in 1931. Your Honors may be casually interested in being able to remember that name Dubbs, because his full name was Carbon Petroleum Dubbs, which indicates the case has to do with oil.

Those cases were consolidated for trial and came on for trial before Judge Nields, occupying some six weeks in June and July of 1932. Briefs were filed and oral argument was had about January of 1934. Judge Nields filed his opinion in April of 1934. The formal decree holding the patent valid and infringed was entered in May, 1934.

The case was appealed to this Court and argued here in January of 1935. The opinion of this Court was in June of 1935, re-hearing denied in August of that year. Certiorari was denied by the Supreme Court in October, and the mandate of this Court went down that same month, October, 1935.

To depart from this particular case in Delaware for a moment. Other cases had been brought by the same plaintiff, the Universal Oil Products Company, commonly called, for short, U. O. P., against refiners in several other places. I should say here that the refiners who were made defendants in all these cases, including the Root case, were users of the somewhat similar apparatus installed by a firm of engineers, and it was claimed by the plaintiff that they were all sufficiently alike so that all were covered by the same considerations.

In about May of 1937, the plaintiff, the U. O. P., amended its bills in all of those cases setting up in full the decree in the Root case as affirmed by this Court—perhaps I should have said it was affirmed and sent back for the accounting in the usual way and has been pending ever since—other suits were brought against these people, one against the Skelly Company in the Court in Delaware, against the Globe Company in Illinois, and against another——.

Judge Biggs: Just a moment. When was the suit against Skelly Oil brought, Judge Denison?

Mr. Denison: I cannot tell Your Honor when it was brought, but the motion to amend the bill alleges that on April 11, 1930, it was filed.

Judge Biggs: I can recall, myself, filing a bill in a case in Delaware, the Universal Oil Products vs. Skelly, for an infringement of a patent.

Mr. Logan: That is an earlier case on a different pate on the Trumbull Patent, which was affirmed by this Cou and is still in the process of accounting below.

Judge Biggs: There is no question raised as to th patent in this present case.

Mr. Logan: Not in this case, no.

Mr. Denison: It is in no way involved. That pate has expired, but that accounting is going on against th Skelly Company. The other cases are, as I said, again the Globe Company, Illinois, and against the Globe Com pany of Kansas, against the El Dorado Company of Kan sas, against the Rock Island Company of Oklahoma, again the Omar Company of Oklahoma, and also against th National Refining Company, Northern District of Ohi and against the same company, or a company of the sam name in Kansas.

In all those cases an amendment was filed, as I say, i May, 1937, alleging that this decree rendered in the Roo case amounted to an adjudication against each of the de fendants in all these cases because it was said that the were so associated with the Root Company in the defens of this case that although not parties of record, they unde the rules in such cases have become bound by the decre as if they had been parties of record.

I can leave that statement at that point for the moment One of those cases against the Globe Company of Illinoi in due time, or after a good deal of due time came on fo trial in the District Court in Chicago before Judge Holly

He decided that it was the proper thing to treat thi proposed issue of res judicata as a separate issue and t try it separately. It had already been partly tried by the taking of depositions in one of the National Oil Compan

cases, but that matter proceeded before Judge Holly at a good deal of length, and he decided treating that issue as a separate one, first, that it was an adjudication, and then upon rehearing, he held it was not.

The reasons for that later holding I will come to later, if I may pass them at the moment.

That is the present state of that case in Chicago. It has been since then tried upon the merits and is pending before Judge Holly for his decision. The question of res judicata normally will come before the Circuit Court of Appeals if either party appeals in that case eventually.

Coming back, now, to the Root case, itself. In December, 1938, the Root Company presented to this Court a request for leave to present to the District Court a petition in the nature of a bill of review to re-hear that case upon the ground of newly discovered evidence, and it set out a new ground of defense which if true and established, completely showed the invalidity of the patent.

That petition for leave to file in that Court was presented to the District Court and was argued before that Court in January, 1939. It turns out that the next day after that argument the Root Company and the plaintiff entered into a contract of settlement. It completely disposed of the controversy. The contract acquitted the Root Company of any damages for past infringement, and gave to the Root Company a full license to practice the patents involved for the remainder of their terms upon certain royalties there stated.

The plaintiff was, therefore, no longer entitled to an accounting, no longer entitled to an injunction, and, as we understand the rule, the proper thing would have been to dismiss the bill because the case had become moot, and, accordingly, that contract of settlement provided:

> "It is agreed between the parties that a final decree of dismissal shall be entered in the above entitled suits substantially in the form of a final decree attached hereto and made a part hereof."

I assume that is the customary form of decree—I will not stop for it now—decree of dismissal.

The very next day, as far as we can interpret the dates here, they changed their minds about that, and under date of January 23rd, a letter was written by the Root Company to the U. O. P., and at the foot of it agreed to by the U. O. P. which, after a recital of the steps which should be taken by the Root Company to cancel its appeal bond, said:

> "Proceedings. Neither the Root or Universal of Delaware shall take any further action or proceeding in such suits of any kind or nature whatsoever without first obtaining the written consent thereto of the other, and all proceedings, other than those referred to in the first sentence of this paragraph, heretofore had in such suits, or either of them, shall remain unaffected by this agreement."

There the matter stands to this day in the District Court, in the first place, an agreement that the bill should be dismissed, and in the second, an agreement it shall not be dismissed, but nothing more shall be done about it until both parties agree.

In the controversy in Chicago the testimony of the managing officer of the Root Company was taken. I have it here in detail, I will not stop to read it. He was asked about this, and he said that he understood that the reason why this modification was desired was that the plaintiff wished to be able to use that decree as affecting the res judicata situation. I have no extra copy of this testimony.

but I think all the counsel have had it. As I say, there the case now stands.

We would suppose from reading Your Honors' opinion in the Cold Metal case, with which, of course, you are entirely familiar—I have it here but I presume it is perfectly in Your Honors' minds—let me say if you follow that as a precedent you would direct that the former opinion of this Court sustaining the patent be recalled, revoked, and that the case be remanded with instructions to dismiss the bill because it had become moot.

Now, I should explain a little more fully the situation of the counsel here today who signed this letter. We were counsel for the defendant in the Root case. In a nominal way perhaps we still are. But Root and Mr. Hamilton representing the Root Company settled that case and they have no further interest in it at present.

I may properly say that on consultation with Mr. Hamilton, he said that in view of the present contract he has with the plaintiff which in many respects is a desirable contract, he doesn't feel at liberty to his stockholders to ask to have that contract of settlement set aside.

That statement was based, in part, on the fact that such information as he now has is, a good deal of it, hearsay, and may not be reliable.

These various defendants in these various cases who have used this Winkler-Koch installation when suits were threatened as against all of them, got together and decided to contribute to a common fund for the defense of any one or more of them that might be sued here or there, now or then.

The Root case was the one that came on for trial first. The costs of the defense were paid out of this common

fund. The controversy that later developed on the res judicata question as to that trial was whether or not, as a matter of fact, the other quasi-associates were merely contributing to the defense, as they had a right to do, without being bound, or whether they were so far controlling the case or participating in the control as to be bound.

That was a question of fact about which a great deal of evidence has been taken, and Judge Holly devoted some attention to that question in his opinion. Reading it perhaps with my own prejudiced eyes, it is a little difficult to say what he really did think about it in the end after he got through with the second opinion, but he thought the second time that the control of the case by the Globe Company in Chicago, and the other defendants, was the criterion, and if the Globe Company did have this participating control during the trial they certainly had lost it and the Root Company had retaken sole possession of its own case by virtue of this settlement which was presented to Judge Holly as ground for re-hearing his first judgment about it, and that is the conclusion that now stands in Chicago as to this issue in that case, although that case also involves, as I have said, the merits of the case on the patent and infringement, and also involves a motion which the defendants made to dismiss the bill for unclean hands on the part of the plaintiff in a matter in no way connected here today, but on account of various transactions that happened down in Texas.

That motion involved, I suppose, some thousand pages of testimony. Then Judge Holly decided against the defendant, refusing to dismiss the bill for that reason. That case now stands there.

While we do not represent the Root Company in making this suggestion today, we do represent some of these other

people defendants as to whom it is claimed that the decree in the Root case is an adjudication, so that these other defendants can no longer deny either the validity or the infringement of the patent. Those people are indirectly affected by the existence of this opinion, this decree, in the first place because it is claimed to be an adjudication, and no one knows, the Courts may so hold eventually; and, in the second place, because it is a judicial precedent entitled to great respect under the rule of comity deciding the validity of the patent and deciding the question of infringement in respects as to which there is similarity in many particulars between the Root cases and those cases.

So much for that—coming to what I have spoken of as the other part of the case, one would have great hesitation in speaking of the subject matter at all were it not for the great publicity which a part of the situation has received in the last few weeks throughout the United States and which, of course, is thoroughly familiar to Your Honors.

I refer to the case of the United States against Davis. That case directly involved a series of Fox transactions with which we in this matter have nothing to do. That case, to some extent, involved the Root case; just how far, it is difficult to say.

It appears, by the testimony in that case—and Mr. von Holst here has the testimony and will present the details if the Court desires anything further—first, Morgan Kaufman, a lawyer up at Scranton, and who was, in the Davis case alleged to be the intermediary, was retained by the plaintiff in this case, the Universal Oil Products Company, in 1932, the same year in which this suit was commenced in Delaware. It appears in that case that Mr. Kaufman was paid in the year 1935, and I believe the date is fairly

definitely fixed as in the fall, or something of that kind, approximately at the time when the Root case was finally disposed of.

I have a memorandum that Mr. Kaufman testified he was paid that as a general retainer for the years 1932, 1933, 1934, and a part of 1935. Whether the retainer had some connection with this case, as I remember, he says, well, it may have. He said that he wasn't active in the case, and I think he said—anyhow, it appears by the records—that his name nowhere appeared in the case as counsel or attorney, or as having any connection with it. Those things appeared in the Davis trial.

The Government prosecuting that case had further evidence concerning the Root case which it desired to present. Specifically, it had a receipt which one might infer was Kaufman's receipt to the Universal Oil Products Company for this payment. Defending counsel objected, and the trial Court thought apparently that any reference to the Root case was too far away, the time was too old, the Statute of Limitations had run, and I suppose the Judge thought it was too remote. At any rate, he sustained an objection to that question, and the Government understood with that ruling they could go no further into anything concerning the Root case and Mr. Kaufman, however far that lead may have gone. So, it stopped.

It appeared, further, in that case that along in the spring of 1935 Mr. Stokley, a cousin of Judge Davis and who owned a property in Florida, wanted to get a loan of $10,000 on his property; and Judge Davis thought that Mr. Kaufman might be able to loan it to him, and Mr. Kaufman had not done so. I think it appears that he says he didn't have the money to loan, I am not very sure about that. Anyhow, he had not done it, it came to nothing.

But in the fall of 1935 Mr. Kaufman did make the loan of $10,000 to Mr. Stokley, secured by a mortgage on property in Florida, property which Mr. Kaufman—I was about to state something that may not be in the record—property in Florida which was of such value that it had been sold for taxes and belonged to the Village of Mount Dora, and the negotiations for clearing up the title were conducted by Judge Davis with the City Attorney of Mount Dora, and the matter was finally closed down in Florida by Judge Davis' clerk or secretary, Mr. Lord, who went down there and turned over the money and got the mortgage.

That is about as far as I can go. Your Honors know that when there is a sensational investigation on by public authorities and when a Grand Jury is summoned and witnesses testify, it is all supposed to be confidential. But people sometimes talk more than they should, grand jurors tell what the testimony was, District Attorneys sometimes like to talk, and in various ways things leak out which may be true and may not be true, and nobody can safely base any allegation on that kind of information. There are other ways of getting it in positive form if it is proper to be had.

It is clear that the United States is possessed of some—I think I should say that the inference is a substantial amount,—of further information about the connection of Kaufman with this case, and what explanation there may be why he received a large sum, if it was a large sum, for work that he apparently did not do, or whether the payment was, in fact, for services in some other matters where he did earn the money, and the important thing in the public interest at this time is to decide, conclude whether it is in the public interest that some inquiry should go further so as to disclose what this further information is.

Now, Your Honors will say, "Well, what can we do about it?" And that is not an easy question to answer.

So far as the legal questions about the present situation of the Root case and what Your Honors will think proper to do with the former opinions of this Court, so far as those are concerned, Your Honors will do what you think best about that. So far as the other matter is concerned, Your Honors may think that in the interest of its own judicial integrity you should make some further inquiry.

I don't know of any precedent for appointing a master to make such an inquiry, but I don't suppose that a Court of great powers is without power to proceed in any proper way to investigate anything it thinks ought to be investigated affecting its own standing for integrity.

Further than that, we feel such an interest that we will be glad to make such an inquiry if we can. Following the usual rule, and a very proper one, we understand that the Government will not give us any information whatever about facts that it has collected. That is their practice, and I suppose that is right as a matter of public policy.

This Court has no power, I presume, to direct the Department of Justice to make available to us all the information it has so that we may proceed if there is basis for it. But I have no doubt, it is unthinkable that the Department of Justice would refuse to do so if this Court had either requested it or indicated the propriety of such a course.

Judge Biggs: Let me ask you this specific question, Judge: What do you conceive to be the duties and the powers of this Court in the proposition?

Mr. Denison: The answer to that is two-fold. As to the present status of that opinion of this Court, whether it should be continued as the basis of a claim of adjudica-

tion or whether in view of the fact that it has now become moot, Your Honors should direct a disposition of it—as to that, our position is that you certainly have the power to direct the District Court to dismiss it as having become moot. It is within your discretion to withdraw the former opinion if you think it should be withdrawn.

That is one answer, and the other aspect of the matter I think I can answer only by a bit of repetition of what I just said.

I think your Honors have the inherent power of any self-respecting court of general jurisdiction to direct that there be conducted in any manner thought proper an investigation at your instance, for the protection or vindication, as the case might be, of the reputation of the Court to the extent that it was involved.

The other thing is, as I have suggested, if Your Honors would say that you think such an investigation should be made but you think you shouldn't make it, and we should, and you think it would be proper for the Government to give us this information. Those two things are all I could say.

Judge Biggs: Judge Denison, should you not formally in writing ask for what you want on behalf of your client so there may be some formal application before us? Or do I understand you to be making some sort of an application?

Mr. Denison: The frank answer to Your Honor's question is I don't know just what should be done. The Root case, itself, has been settled. As counsel for the Root Company we can't do anything. As counsel for these other companies against whom the thing is alleged to be an adjudication and which other companies the plaintiff claims

were really defendants in this case—as representing those companies we could file a formal application, I suppose.

Judge Biggs: We have nothing formally before us.

Mr. Denison: That is true, Your Honor. We thought, although we couldn't know, we might get an intimation from Your Honors as to what should be done.

Judge Biggs: Well, of course, Judge Denison, it would not be proper for us to give anything in the nature of an advisory opinion in the premises. Before we can act we must have something before us, I think, speaking for myself, in writing and in a formal fashion. The course you are to pursue in that connection is one for you to determine.

Mr. Denison: Yes. We anticipated Your Honors might think so, and yet we anticipated Your Honors might think the Court had an interest on its own account and should proceed on its own motion, and if we are to proceed we very likely should formally apply to Your Honors for a suggestion that the Department of Justice ought to give us this information.

Judge Biggs: Judge Denison, in order that we may have this situation formally before us, you do represent certain persons who are directly concerned in the Root Refining case, the two cases to which you have referred, is that correct?

Mr. Denison: That is part of the truth. We have always denied on account of these other defendants—we have always denied and we do deny that there was that participation by them in the Root cases that made them really parties, and we can't come in and say they were parties.

Judge Biggs: Do you conceive you might have a right to proceed in this matter amicus curiae? What have you to say to that?

Mr. Denison: We had thought of that, and I would say to that, that such a proceeding is broadly within the general thought of proceedings by amicus curiae, but I know of no precedent for it, and such proceedings ordinarily are applications for a re-argument of the case, itself, and that very case is out of existence, it has been settled. That is the complication there. The problem is a difficult one.

Judge Biggs: We think that an application made on behalf of a friend of the Court can be entertained at any time in any matter. However, we have not, of course, had the advantage of an examination of the authorities in the situation. Suppose we pass that for the present.

Mr. Logan, is there something you were about to say?

Mr. Logan: I represent two other clients who are interested. One is Vickers Petroleum Company which is being sued as a licensee of Universal Oil Products Company on the theory that it was using these two patents, the Dubbs Patent and the Egloff Patent, since the adjudication of this Court.

Now, if the adjudication had been that those patents were invalid, Universal would not be in a position where it could claim royalties for the use of those two patents from that client.

I represent another client, Eastern States Petroleum Company, which took a license after the decision and largely because of the decision. In fact, the letter which was probably the basis of it and induced them to make the license has annexed to it a copy of Judge Davis' opinion showing

them, as a refiner, that they were in grave danger because those two patents had been sustained and were valid.

They subsequently made a settlement with Universal in which they surrendered consideration having a value of $250,000 and made a further agreement to arbitrate whether or not they were still using any of Universal's patents. They would not be in a position of being tied to that agreement, but for the original agreement they have a real and vital interest.

I feel that I can say this to the Court: I have been informed and believe that the F. B. I. made an investigation into this particular situation. I believe this Court could ask for that, and I think this Court if it studied that F. B. I. report could come to a better decision than we can as to whether or not there was any impropriety in the employment of Mr. Kaufman and his payment of money to the cousin of Judge Davis while the matter was pending, or shortly thereafter.

I think the Court can do that on its own motion, and as a friend of the Court I call the Court's attention to the fact there is an F. B. I. report covering the entire situation, and on information and belief I understand, further, that at the trial Mr. Gahagan sought to prove that the $10,000 paid by Mr. Kaufman to the cousin of Judge Davis came from the moneys he received from Universal in that he did not have that much in his bank account until he received the money from Universal.

I say that because people who attended the trial saw Mr. Gahagan standing with bank statements in his hand and offering to make that proof, which was ruled out.

I understand on information and belief, further, that a very substantial sum of money was paid by Universal to Mr. Kaufman at that time.

Mr. Denison: May I say one word further? Mr. von Holst calls my attention to the fact that I have omitted the first thing on my notes, which was to say that we do not make any charge or intimation in the remotest way of any unprofessional or unethical conduct on the part of any of the counsel of record in this case. They are, all of them, above any such suspicion.

Mr. Logan: I want to join in that. I forgot that Judge Denison hadn't stated it. We had agreed that it would be stated that counsel of record for Universal were not parties to any impropriety, and certainly did not know of it. We are all convinced of that.

Judge Biggs: Gentlemen, it is necessary for the Court to attend to certain other business which is unconnected with this case, for a period of about ten minutes. We will recess for ten minutes, and at that time, Judge Haight, we will hear you or any of the other gentlemen on the other side.

(Recess at 3:40 P. M.)

Judge Biggs: Judge Haight.

Mr. Haight: If Your Honors please, I think that I can be very brief. On the matter of an investigation, we do not feel that it is anything that we have anything to say about. It is a matter for Your Honors to decide, according to what you think is right and proper.

I do suggest, however, to Your Honors this: Kaufman and Judge Davis have been tried. As I understand it, the jury disagreed, and they are to be brought to trial again. You may feel under all of the circumstances that an investigation of Kaufman's interest in this particular litigation

would be an improper thing under all of the circumstances at this particular time. I only make that as a suggestion to Your Honors. It isn't for us to say whether you should or whether you shouldn't.

As Judge Denison has said, Kaufman's connection with this case was investigated by the Department of Justice, I think as early as the fall of 1939. All the information that we had, and what not, was given to the Government at its request. It was investigated again in connection, as I understand it, with all of Kaufman's cases by the Special Grand Jury in New York the winter before last. So, so far as the public interest is concerned, an investigation has been already conducted.

Now, our brothers on the other side are particularly interested, and the only interest that they can have is to see that this judgment that was entered by Judge Nields and affirmed by this Court is not used as a precedent against them or as res judicata. I think that I can cut that knot, and I do it, cutting at the same time all technical considerations.

This judgment was entered by Judge Nields in April of 1934, he having held the case for almost a year, I think. Judge Denison was a little wrong in his dates. It was appealed to the Circuit Court of Appeals and decided in June of 1935. The certiorari was disposed of in the following fall. No assertion of res judicata was made in any cases until a year and a half, maybe two years thereafter.

At the time this suit was pending in Delaware there were other suits pending and brought by us against other infringers. This invention which was the subject matter of the suit we considered a very great invention. It was used generally throughout the oil cracking industry and

had supplanted all other oil cracking processes, except variations, which had theretofore existed in this country. Suits were pending against the Texas Company, and the Standard Oil, and what not.

This case was defended by a group of refiners in the Middle West, and this particular defendant in Louisiana, and it was on the theory that these people had as a group defended this case that the assertion of res judicata was made.

We didn't know with any certainty whether that could be sustained or not, and it was only after taking testimony over a long period of time that we finally got the thing in shape and submitted it to Judge Holly.

Now, on the matter of precedent, I don't assume that this case will be a very great precedent in view of what has happened, but, however, it may be, we are willing to do this: Judge Denison, I think, is wrong in saying that there has been a complete settlement of the Root case. The decree that was made is still outstanding, and that decree carries with it an injunction and an order for an accounting. The accounting was settled, a license was taken, so I take it that the case is still alive.

We are willing and we offer to let Your Honors take the record in this case, the briefs with oral argument or not, as you see fit, and determine whether this case was properly decided or whether it was not properly decided. We raise no technical objection and will raise none.

If it was properly decided, then we ought to have the benefit of it. If it was improperly decided, then the other side ought to have it. I make that offer with a full realization, which I think Your Honors will appreciate, that the attitude of this Court as presently constituted is far less

liberal in its treatment of patents than the attitude of your predecessors, but I make it notwithstanding that because we believe that this was—it has expired nearly three years ago, the patent—the patent we believe covered a great invention and one that should receive protection.

$30,000,000 of royalties were paid under this patent before this case was tried, and rather than to continue to pay royalties, two of the great oil companies of this country paid $25,000,000 for the stock of the company before this case was tried. We had some other patents, but this was the big patent.

We feel confident of the patent, but we are willing that Your Honors shall decide it in view of everything that has transpired.

Now, it was with that same spirit—and I think it is the spirit of fairness, even though I have to say it myself—that when this case had been decided and we had pending here a suit against the Skelly Company, the largest infringers of the group, of which the Root Company was one, whom we could have sued, whose suit we could have prosecuted in Delaware, and we had suits pending against the Cities Service subsidiaries, one in Delaware, and one in the Eastern District of Pennsylvania, the biggest infringer, if it was an infringer; as we thought it was, that we had, but the gentlemen on the other side wanted to try one of these cases in the West, and Mr. Hall agreed with Mr. Thiess, to pick his man, his defendant, and he picked one. That suit was pending in Kansas.

A week before that case was tried that concern settled. I was packing my grip on the way to go out to Kansas to lend whatever little assistance I could in the trial of the case. And then they wanted to press with another case.

So, we agreed upon pressing the case of the Globe Oil Refining Company in the Northern District of Illinois. That case we tried, and we tried for a long while. I think it was almost two months last summer, and Judge Holly has had it under consideration.

Now, we were willing to abandon the suits pending here —temporarily, I mean—to go out there and let them try these cases again in the West, and I say to Your Honors honestly that when we made those agreements we didn't know whether we could get any evidence to sustain res judicata or not, but one other thing we knew, that a defense that they hadn't interposed in this case, namely, prior inventorship on the part of another person, would certainly be raised in these other cases, and notwithstanding that, we were willing to go off our own dung hill, so to speak, where there was a liberal court and where the patent had been sustained, and try it in the West, and we did.

Now, I think that is all I need or I can say to Your Honors. I haven't read the testimony in this trial that has recently taken place in Philadelphia. I have seen extracts of it from time to time in the newspapers, but only extracts, and then fragmentary, because I have been away a great part of the time that that unfortunate trial was going on, and I can't speak with any reference to that whatsoever. But so far as the interests of these applicants, I will call them now, defendants are concerned, we think that the offer that we made takes care of them.

Mr. Logan's clients, so far as I see, have no standing whatsoever in the Court. There was a suit brought against one concern on a contract made less than a year ago. It hasn't anything to do with this patent because this patent

expired in '38. That was the Eastern States—I think that is the one that he mentioned—and the other is the Vickers.

The Vickers Company has been a licensee of ours for many years, but he gets an idea every once in a while that he having a favored nation clause isn't getting what other people have. Whether that is the result of the fact that he doesn't like to pay royalties over a certain period of time or not, I don't know, but in 1934 before this decision had been rendered, he entered into a contract with us, and when he didn't pay his royalties a little while ago we sued him in the State Court of Delaware, which is his domicile. In the same Court was pending this other case, this Eastern States case.

He has raised there the question that his client has not received the same royalties that others have; in other words, what we speak of as a favored nation clause has been violated.

How that has anything to do with this patent I haven't the slightest idea. The patent was gone in 1938, and he didn't stop paying royalties until when? 1939.

Mr. Logan: No, royalties run from 1935——

Mr. Haight: But you didn't stop paying then. When did you stop paying?

Mr. Logan: I think the last payment was sometime in 1935. You are suing from 1935 on for the two Dubbs Patents, and at the present time asserting they are using the Egloff Patent, which is the other patent involved in the other case.

Mr. Haight: I think Your Honors have listened to me to that extent and I don't think there is anything more that I can say.

Judge Biggs: I have two questions which I desire to ask you.

Mr. Haight: Yes, sir.

Judge Biggs: First, does either of these two patents, the Egloff Patent or the Dubbs Patent, have anything whatsoever to do, or any position in connection with the Trumbull Patent?

Mr. Haight: No, except Trumbull was the predecessor of Dubbs.

Judge Biggs: But it has nothing to do on the merits with the validity of the patent?

Mr. Haight: No, I forgot——

Judge Biggs: My connection is so slight as to be almost negligible. It was one of those base tending jobs which Delaware counsel are occasionally fortunate enough to have. I think it was in 1925 and 1926. I think my correspondence was with Mr. Darby, but I have not been able to find the record of the case; I think Samuel Darby.

Mr. Haight: You are sure it wasn't with me?

Judge Biggs: No.

Mr. Haight: I don't think I did start that; it may be Mr. Hall did, I don't know.

Judge Biggs: It has nothing to do with it.

Mr. Haight: It has nothing to do with it. That case was decided by Judge Morris, as I recall it, in 1928.

Mr. Morris: I happen to recall that case, Judge Biggs. There are a great many of them I wouldn't recall, my memory is faulty; but I think that a decision on that is in 12 Federal 2nd, having to do with patents, and I think that had to do with the Trumbull Patent in the Skelly Oil Company case, and I am pretty sure I decided that the Trumbull Patent was a valid patent, and there is no relation, as far

as I recall, between the Trumbull Patent and the Dubbs Patent or Egloff Patent. I do not now recall really what the Dubbs Patent or the Egloff Patent happened to be, although my memory does tell me that the Trumbull Patent to which Your Honor refers was a partial bleed patent, or something to that effect.

Judge Biggs: One other question, gentlemen: Our mandate, or the mandate of this Court has gone down in this case. Just assuming that Judge Denison and those associated with him accepted the offer, so to speak, that you have made, would we have any jurisdiction over the cause?

Mr. Haight: To recall the mandate?

Judge Biggs: To recall the mandate at this time.

Mr. Haight: Oh, I think so. They did it in New York. Certainly, you can do it by consent, and we will give our consent to anything that will enable Your Honors to reconsider the case on the record with or without argument.

Judge Biggs: Let me ask this question: Judge Denison, do you agree, or so far as you know—you may not be in a position so that you can agree, but do you agree or do any of counsel associated with you—Mr. Logan, I think, has already expressed himself—do you agree the Trumbull Patent has nothing to do with the situation?

Mr. Denison: Let me speak to my associates.

I think we should say yes, we agree to that. It was a part of the state of the art.

Judge Biggs: I do not desire to cause any embarrassment, of course, to any counsel in the case. I take it, then, that all counsel would agree that so far as you know, I would have no disqualification in the premises.

Mr. Denison: We certainly do.

Mr. Haight: We agree.

Judge Biggs: You had something you desired to say?

Mr. Denison: Yes, Your Honor. The suggestion which Judge Haight has made is not only new to us here but perhaps utterly unique. It is that as I take it, they will formally withdraw their claim in all these other cases that this decision is an adjudication and agree to abandon that claim.

Judge Biggs: I didn't so understand him.

Mr. Haight: I said that this Court could reconsider, and if it decides that we are right, it is all right.

Mr. Denison: On the subject of res judicata I certainly understood him to say——

Judge Biggs: I don't think Judge Haight addressed himself to the subject of res judicata, as I recall it.

Mr. Denison: If I misunderstood him, I have nothing more to say about that, if he didn't make that suggestion.

He did say, also, that perhaps this wouldn't be much of a judicial precedent, but he certainly can't withdraw it as a judicial precedent. Some Judges might think that and some might not. It may be a matter of practice that the decisions of one or two Judges are not now as much respected as they used to be, but I think there was another thing I should say—two other things along the line of the suggested re-argument.

I don't see how it could be done. The Root Company has settled this case, the case is moot. Perhaps that is not an obstacle to the Court's re-hearing something if it wants to. I don't know about that, I don't think it ever happened.

Judge Biggs: I understood from what Judge Haight said and also from what you said, Judge Denison, that there was an outstanding decree in Delaware based on the mandate of this Court.

Mr. Denison: Yes, it has not yet been disposed of finally.

Judge Biggs: On the point of validity.

Mr. Denison: The case was pending there on the accounting, but it was completely settled. There can never be an injunction because they have a license. There can never be an accounting because they discharged all liability, that is the end of that case. For some reason they just first agreed to dismiss, and then said they would not dismiss it at present and there it is.

It has developed, as has been specified, that a new defense and a fatal defense if it can be established has been brought into the situation by the motion to re-open and rehear this case and by complete proof of it in the Chicago case. If we represented the Root Company or anybody capable of agreeing and they all wished to re-hear, the defendants would not wish to re-hear the case leaving out of it a defense which in their minds is perfectly conclusive. There are innumerable difficulties in trying to work out any such idea, it seems to me.

There is this further consideration. Even if the former decision of this Court were out of the way somehow or another, if what is supposed to be shown by this F. B. I. report and what is supposed to be the fact as to the conduct of the plaintiff in this case in connection with obtaining the judgment which was here obtained and the presenting of that to the other Courts as an adjudication—even if they withdrew it, of necessity they would be guilty of unclean hands conduct condemned by the Supreme Court in the Keystone case, and everyone of those cases must be dismissed now because of their unclean hands. They can't get away from that by withdrawing now after there has

been pending for years and has been tried, their claim that this case was an adjudication.

May Mr. von Holst say a word, Your Honor?

Judge Biggs: Yes.

Mr. von Holst: I have this to say, if the Court please. On the question of re-argument in so far as it bears on the Root situation, I was in conference with Mr. Hamilton of the Root Company lately, and they settled their litigation after long years of costly litigation, and their position, of course, is that they would not want to jeopardize their present position.

In other words, the Root Company would not for a moment consent to throwing the whole thing open again and taking their chances on a new adjudication where they might win or they might lose, and I did not understand Judge Haight's offer of a re-argument to include a statement if the decision went against Root again, that then Root would be secure in the settlement which they made in 1939, and, of course——

Mr. Haight: We will give them that.

Mr. von Holst: With that understanding, of course, the situation is changed to that extent. My only position on that would be that there is no counsel present here authorized to speak on behalf of Root at this time in response to Judge Haight's offer. Otherwise, I don't change or modify anything that has been said heretofore, because we do not, as we made plain in the opening, represent the Root Company before Your Honors.

Judge Biggs: But you could appear in any re-argument or re-hearing if you desired to do so amicus curiae, and if the Court would grant you that permission. In other words, if you would appear amicus curiae and, amicus curiae,

argue the case, the case being argued on the other side, the question of the jurisdiction might remain, but leaving out the question of jurisdiction, you could recall the mandate of the Court by way of stipulation, and the case could be decided completely, so to speak, as if a re-hearing had been granted; isn't that true?

Mr. von Holst: With Root secure in its settlement in the event that there should be an affirmation.

Judge Biggs: You then have the question of a new defense, and, conceivably, the question of unclean hands, but if the case is re-opened, I suppose it would be re-opened for all purposes. The primary obstacle would seem to me to be one of jurisdiction.

Mr. von Holst: Yes, sir.

Judge Biggs: Jurisdiction to recall the mandate. That could be done only, as I understand it, by stipulation; is that correct?

Of course, if there was a fundamental question of fraud in the previous judgment of this Court, I assume that we would retain jurisdiction—speaking for myself, now—I think that we probably would retain jurisdiction for all purposes because the act of the Court would be a nullity, and, therefore, it would be as if the cause were still pending. It would certainly raise some very delicate questions of jurisdiction.

Were you going to say something, Judge Haight?

Mr. Haight: I was going to say this, so far as the decree is concerned, you understand the minute Root stops paying royalties, then the decree would become effective if we wanted to make it effective, and the injunction would go against him, so there is still an outstanding decree, and it seems to me that the question of jurisdiction and everything of that kind can be waived by us.

We don't want this judgment floating around if there is any question about it. We want it heard by this Court, and I don't think there can be any question about it.

So far as the other defense is concerned, you understand that has been interposed in the Chicago suit and is waiting decision there. The decision of this case would only go in so far as the matters that were here presented are concerned.

Mr. von Holst: I would like to reply to one point and pay my respect on the Cold Metals Process case. If Root should refuse to pay royalties the action would not be for the injunction, the action would be on the contract. Having entered into a license, the decree is completely superseded, the case has become moot.

Judge Biggs: We think, Judge Denison, that you should embody in a written motion or a petition so that it may be formally on the records of this Court whatever relief it is that you seek, or what you desire by way of prayer or motion to have this Court do, and then the other side of the controvery may make an appropriate reply, and the whole matter may be one of record in which the Court may determine the issue.

Mr. Denison: We will endeavor to do that.

Judge Biggs: And you might do that, if you desire, amicus curiae.

Mr. Logan: Is there to be further argument on any such motion, or is this argument to be considered nunc pro tunc——

Judge Biggs: We will not pass on that question, Mr. Logan, at this time.

Mr. Stenographer, you will make copies of this record available to the Court and to counsel in the usual way and for the usual charges.

EXHIBIT 2

Petition of Arthur C. Denison, J. Bernhard Thiess, and Thorley Von Holst, as Amici Curiae

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioners, Arthur C. Denison of Cleveland, Ohio, and J. Bernhard Thiess and Thorley Von Holst of Chicago, Illinois, as *amici curiae*, respectfully show:

I.

Each of them is a member of the Bar of this Court, *pro hac vice*, in relation to the subject matter here involved. They file this petition as *amici curiae* pursuant to the permission of this Court announced in open court in a preliminary and informal hearing, on June 5th, instant.* They repeat here, what they then stated orally,—that there is not intended to be in this petition any charge or intimation, or any suggestion whatever, that there was on the part of any one of the counsel *of record* for the Universal in the *Root* case, any unprofessional or unethical acts of any kind or degree.

---

*The announcement by the Court was in the following language (R. 27-8):

"Judge Biggs: We think, Judge Denison, that you should embody in a written motion or a petition so that it may be formally on the records of this Court whatever relief it is that you seek, or what you desire by way of prayer or motion to have this Court do, and then the other side of the controversy may make an appropriate reply, and the whole matter may be one of record in which the Court may determine the issue.

"Mr. Denison: We will endeavor to do that.

"Judge Biggs: And you might do that, if you desire, amicus curiae."

II.

Their request to this Court to take action pertaining to the above-entitled cases rests, *first*, upon their status as officers of this Court, and *second*, upon the threat to the interests of the defendants in the other cases hereafter listed, which threat arises from the use by the above-named plaintiff of the opinion of this Court in the above-entitled causes as a judicial precedent and the use of the decrees in these cases as an adjudication against each of these other defendants so hereafter listed.

III.

The jurisdiction of this Court rests upon the inherent power of the Court at any time to examine into the suggested existence of fraud and corruption affecting and tainting any former action of such Court.

The petitioners thereupon show:

IV.

The above-entitled causes came on to be heard in the District Court for the District of Delaware in June and July of 1932, having been on file in final form for more than a year. The Bills of Complaint charged infringement of United States Letters Patent to Dubbs, No. 1,392,629, and to Egloff, No. 1,537,593. On April 27, 1934, District Judge Nields of the District of Delaware rendered his opinion finding validity and infringement of both patents and awarding an injunction and an accounting. Interlocutory decrees of the District Court, pursuant thereto, were entered on May 18, 1934. Appeals by defendant were duly prosecuted from these decrees, argument was had before Judge

Buffington, Davis, and Thompson, in January, 1935, and on June 26, 1935, this Court rendered its opinion, written by Judge Davis, affirming the decision of the District Court. On August 6, 1935, the defendant's petition for rehearing was denied. A petition for certiorari to the Supreme Court of the United States was thereupon presented and denied, and on October 31, 1935, the mandates of this Court went down to the District Court.

Accounting proceedings were thereupon instituted and on January 24, 1939, while the same were pending, the defendant (hereafter called "Root") entered into an agreement with the plaintiff whereby it took a license under the plaintiff's patents in suit (and others) and settled the plaintiff's claim for profits and damages and was discharged therefrom. Petitioners represented the Root Refining Company in said cases at all times prior to the settlement, but did not represent it in making its said settlement, and have not since, and do not now, represent it. The settlement provided that the above-entitled causes should be dismissed; but, by subsequent agreement entered into the next day, to-wit, on January 25, 1939, this provision was modified and it was agreed that neither party to the suits should take any further action or proceedings of any kind or nature whatsoever (save for the discharge of Root's *supersedeas* bond, and dismissal of certain proceedings it then had pending for rehearing) without first obtaining the written consent thereto of the other, with the result that the above-entitled causes are still formally pending in the District Court of Delaware.

V.

In addition to the above-entitled causes, Universal Oil Products Company (hereafter called "Universal") has filed

e following suits, all of which are now pending, for in-ingement of the said Dubbs and Egloff patents:

Universal Oil Products Company v. *Skelly Oil Company*, Equity Nos. 785 and 893, in the District of Delaware. Bills filed on April 11, 1930, and July 7, 1931.

Universal Oil Products Company v. *Globe Oil & Refining Company of Illinois*, Equity No. 10,744, Northern District of Illinois. Bill filed July 22, 1931.

Universal Oil Products Company v. *Omar Refining Company*, Equity No. 1779, Western District of Oklahoma. Bill filed August 21, 1935.

Universal Oil Products Company v. *El Dorado Refining Company*, Equity No. 819-N, Second Division of the District of Kansas. Bill filed July 23, 1934.

Universal Oil Products Company v. *Globe Oil & Refining Company of Kansas*, Equity No. 821-N, Second Division of the District of Kansas. Bill filed July 25, 1934.

Universal Oil Products Company v. *Rock Island Refining Company*, Equity No. 4559, Eastern District of Oklahoma. Bill filed August 23, 1934.

Universal Oil Products Company v. *Anderson-Prichard Oil Company*, Equity No. 1645, Western District of Oklahoma. Bill filed August 23, 1934.

In each of these cases, save the last, the Bill was amended in May of 1937 by adding allegations charging that the defendant was bound by the decision in the *Root* cases under

the doctrine of *res judicata*. In the *Anderson-Prichard* case, an amendment was filed setting up the opinions in the *Root* cases as judicial precedents. In the *Globe* case in the Seventh Circuit the issue of *res judicata* was decided adversely to the plaintiff, and after trial on the merits and submission of briefs and argument, the case is now pending for decision by the District Court. Whichever way the decision should be, the question of *res judicata* will probably be an issue on appeal. On June 16, 1941, counsel for plaintiff in the *Globe* case addressed a letter to the District Judge saying that they prefer that he "pay no attention to the decision of the Circuit Court of Appeals" (for the Third Circuit in the *Root* cases) "as a predecent, or as having any other effect in the *Globe* case beneficial to Universal, until this matter" (of the investigation herein suggested) "has been completely disposed of."

VI.

Your petitioners are attorneys for each of the defendants in the cases above listed.

VII.

In the March session, 1941, the United States of America filed an indictment in the District Court of the United States, Eastern District of Pennsylvania, No. 8969, against J. Warren Davis, William Fox, and Morgan S. Kaufman, charging conspiracy to obstruct justice and to defraud the United States in the matter of William Fox, bankrupt. To this indictment the defendant Fox pleaded guilty, and the case against Davis and Kaufman came on for trial on May 19th, 1941, and was concluded on May 29, 1941, the jury having failed to reach a verdict.

VIII.

On the trial of the indictment, certain testimony was given and evidence introduced which petitioners deem to have a relation to the decision of Judge Davis, speaking for this Court, in the *Root* case. Thereby, among others, the following facts and circumstances were developed:

Morgan S. Kaufman, an attorney residing at Scranton, Pennsylvania, was retained by Universal in 1932 (the year the *Universal-Root* cases were heard on the merits in the District Court), and his employment extended for a period of three and one-half years (ending about the time the *Root* cases were decided in the Court of Appeals). He received payment in 1935 for whatever services he rendered pursuant to that retainer. He was retained in the *Root* cases,* but was never attorney of record therein. Quotation will be hereinafter made of Kaufman's testimony concerning his employment by, and work for, Universal.

Charles Lee Stokley, of Mount Dora, Lake County, Florida, is a cousin of Judge Davis; for many years, Stokley was the owner of certain real estate in Florida and was engaged in the business of orange growing; he owned a number of blocks of real property in the town of Mount Dora which had become subject to liens for unpaid paving and other taxes due to the town of Mount Dora in the sum of approximately $28,000, and in 1934, the town of Mount

*Your petitioners state to this Court that at no time, either in the Root cases or in any other case brought by Universal on the Dubbs and Egloff patents in which your petitioners represented the defendant, did the name or person of Morgan S. Kaufman ever appear in any connection whatsoever. At the indictment trial, Kaufman did not state or intimate that he ever appeared as attorney of record on behalf of Universal in any case during the period of said retainer.

Dora foreclosed its liens on said property and the town purchased same at the foreclosure sale. Later in 1934, Stokley talked with Judge Davis about obtaining money to redeem said property and Judge Davis tried hard to obtain a loan for Stokley "in other places" before he took the matter up with Kaufman.

In the spring of 1935 (after the *Root* cases had been argued in the Court of Appeals, but before they had been decided), Judge Davis asked Kaufman if he would be interested in making a loan on the Stokley property. Kaufman told Judge Davis that he would consider making a loan to Stokley if the value was there (meaning in the property).

A number of letters and telegrams were exchanged between T. H. Cooley, City Attorney for the town of Mount Dora, and Judge Davis in the spring, summer, and fall of 1935 relating to the Stokley property and its redemption.

In March, 1935, Cooley had a conversation with Stokley regarding this matter, and on March 28, 1935, Cooley wrote Judge Davis regarding the Stokley property and the possibility of the town accepting $7,500 in full settlement of paving and taxes. On April 5, 1935, Judge Davis wrote to Cooley as follows:

> "United States Circuit Court of Appeals, Third Judicial Circuit, Trenton, N. J., April 5, 1935, Chambers of Judge Davis.
>
> "Thomas H. Cooley, Esquire, Mt. Dora, Florida.
>
> "Dear Mr. Cooley:
>
> "Your letter of March 28th relative to the taxes of my cousin, Mr. Charles L. Stokley, was received. I hope that you will be able to secure the compromise which you mention in full settlement of his paving and taxes.

"You state that you are acquainted with the titles to his properties and you think that they are good. I understood from him that a few years ago he had an abstract made by some title company. I may be mistaken, but that was my understanding. I told him that he would have to have that brought up to date. I am sure that the parties I have in mind, here, whom I hope to get to advance the money, would require an abstract and probably a title insurance policy.

"I like Charlie very much. He is a good friend of yours and speaks earnestly about his admiration for you. Anything that you can do to help him in this matter will be personally appreciated by me.

"Yours sincerely

"J. WARREN DAVIS."

On July 23, 1935 (the month following the handing down of the decision in the *Root* cases), Cooley wrote to Judge Davis and in the letter he listed the properties and the amount of the taxes against each piece thereof, showing the total taxes aggregating $28,411.82, and advised Judge Davis that the town council of Mount Dora had expressed a willingness to sell the property for $10,000, and that if arrangements could be made "reasonably prompt," Mr. Stokley could get his property back for $10,000.

On, or shortly before, October 4, 1935 (while Root's application for certiorari in the Supreme Court was pending), Kaufman advised Judge Davis that he had decided to loan $10,000 to Stokley, although Kaufman did not testify that he had learned or knew anything more about the value of the property than he knew in the spring. Kaufman had not yet met Stokley. Kaufman had not then, nor did he ever afterwards, see the property. On October 4, 1935, Judge Davis telegraphed Stokley that the money had

been definitely promised. (On October 21, 1935, certiorari in the *Root* cases was denied by the Supreme Court.) On October 24, 1935, Cooley telegraphed Judge Davis as follows:

> "Amount to be paid town direct Stokley property ten thousand net stop County taxes to be assumed by Stokley twenty seven hundred stop This is our agreement heretofore had with Stokley stop Presume Stokley is there by now advise stop."

On October 25, 1935, Judge Davis wrote Cooley a letter in which he expressed surprise concerning the taxes due to the County and, among other things, stated:

> "Mr. Stokley may be able to raise the $13,000 from some other source but frankly Mr. Kaufman does not want to take the property unless it is free and clear of taxes and he is unwilling to put more than $10,000 into it."

Judge Davis arranged a meeting in his chambers at Trenton, New Jersey, between Kaufman and Stokley, in the latter part of October or early in November, 1935, when Kaufman met Stokley for the first time. Thereupon, Judge Davis directed his clerk, Mr. Thorne Lord, to join Kaufman and Stokley in a conference in the Judge's library nearby concerning the matter and an agreement in writing between them was dictated to Judge Davis' secretary with Lord's assistance. After it was typed, said agreement was transmitted by Lord to Kaufman at Scranton; it was executed by him and returned to Lord, together with Kaufman's check, dated November 14, 1935, for $10,000 payable to Lord. Cooley and Judge Davis then arranged for Lord, who was looking after the matter for Kaufman,

to go to Mount Dora and close the transaction. Lord reached Mount Dora on November 24, 1935, taking the agreement and check. He got in touch with Cooley and Stokley and closed the transaction by, among other things, procuring from the town of Mount Dora a deed to Kaufman to the Stokley property in consideration of $10,000, to pay which he endorsed the Kaufman check to the town of Mount Dora and delivered it to Cooley.

Kaufman has never seen the property to which he took title from Stokley, although Kaufman has frequently visited in Florida for many years. Some, but not all, of the interest due on the loan has been paid by Stokley to Kaufman, but none of the principal.

On the trial of the indictment, Kaufman, a witness on his own behalf, testified in part as follows on cross-examination by government counsel and the Court, this being all of the testimony which the Court permitted to be elicited from Kaufman by government counsel with respect to his employment by Universal and the services rendered thereunder by him:

> "Q. Now, I show you the docket of *Root Refining Company* v. *Universal Oil Products Company*, sir.
>
> "Mr. Gray: There is no question, if I may suggest it,—you are showing him the docket entries. Wait, there is no question put.
>
> "By the Court:
>
> "Q. Was it pending when the Stokley loan was made—that particular case?
>
> "Mr. Gray: That is the question.
>
> "The witness: I cannot tell you about that, Judge.
>
> "By Mr. Gahagan:

"Q. Can't you look at the entries?

"A. My name is not—I was not the attorney of record in that case.

"The Court: You cannot answer it?

"By Mr. Gahagan:

"Q. But were you in court at any time in that case?

"A. No, sir.

"Mr. Gray: Objected to as immaterial and irrelevant.

"The Court: He has answered that he cannot answer that question, Mr. Gahagan.

"By Mr. Gahagan:

"Q. Well, when you say you cannot answer the question, do you mean to say you do not know the proceedings in this case?

"A. Oh, my name does not appear as a matter of record, or I did not appear in court. Those are the two questions you asked me.

"Q. Yes, sir. Now I am asking whether or not you can tell what happened in that particular case.

"Mr. Gray: Objected to.

"By the Court:

"Q. Were you counsel in that case?

"A. I was not of record.

"Q. Were you counsel?

"A. I was counsel—I was retained in the case but never acted actively in the case.

"Q. Was it pending while the Stokley loan was made?

"A. I really could not tell you.

"The Court: All right; go on with the next case.

"By Mr. Gahagan:

"Q. I show you, sir, a receipt——

(Counsel come forward to examine papers.)

"The Court: You gentlemen take your seats.

"Mr. Gainsburg: Will your Honor hear us for a moment at side bar?

"The Court: Yes.

(Conference at side bar.)

"By Mr. Gahagan:

"Q. Did you receive a fee, Mr. Kaufman, in connection with the *Universal Oil—Root Products* case, sir?

"A. No, sir; I received a fee as general retainer.

"Q. In connection with that particular case, sir?

"A. Not in connection with that particular case—everything else that took place.

"Q. What else that took place?

"A. I was retained for three and a half years——

"Mr. Gray: Since he is going into it, your Honor,——

"The Witness: It started in 1932,——

"The Court: Go ahead, Mr. Kaufman.

"The Witness: —and it concluded—when I got my fee it was 1935.

"By Mr. Gahagan:

"Q. And what did you do for the company in those three years?

"Mr. Gray: Objected to.

"By the Court:

"Q. Now, did any part of that fee you received cover services either directly or indirectly in connection with this case?

"A. Well, it may have, Judge, but the way that we figured it out, that I was retained generally for so much a year, but I was not retained—I did not do anything particularly in that case.

"The Court: Well, that is enough.

"Mr. Gahagan: Now may I ask this question:

"By Mr. Gahagan:

"Q. Did you do any other work for them in 1936?

"Mr. Gray: That is objected to.

"The Court: Objection sustained.

"Mr. Gahagan: May I argue this point, your Honor?

Mr. Gray: Unless your Honor wants us to come up, we won't. If you do, sir, we will.

(Mr. Gahagan confers with the Court at side bar.)

"The Court: Well, that is as far as I am going to let you go on that matter.

"Mr. Gahagan: Do you wish to see this (handing paper to counsel)?

"By Mr. Gahagan:

"Q. Mr. Kaufman, did any part of that $10,000 check money that you received from the Universal Oil, sir—— (hands paper to witness)

"Mr. Gray: Objected to, if your Honor pleases.

"Let me see the paper.

"Mr. Gahagan: This is the check.

(Conference at side bar between Mr. Gray and Mr. Gahagan.)

"The Court: Mr. Gray's objection is sustained."

Thus, the facts concerning Kaufman's activities pursuant to his retainer by the Universal were only partially developed, but your petitioners respectfully suggest to the Court that the foregoing limited disclosure of facts and circumstances surrounding the retainer of Kaufman by Universal and the Stokley loan do not suggest the usual and customary retainer of an attorney for legal services to be performed in connection with a pending litigation, nor

a usual good faith business transaction involving the investment or loan on proper security of so large a sum as $10,000. Rather, they suggest the secret retainer of counsel for services of a clandestine nature by a party to a case pending before a Judge to, and from whom, favors were illicitly extended and received.

IX.

In addition to the matters set forth in Paragraph VIII above, your petitioners are informed and believe, and on such information and belief state, that the Federal Bureau of Investigation of the United States Department of Justice, and the prosecuting attorneys of the Department have conducted extensive investigations into the circumstances surrounding the decision by Judge Davis in the *Root* case and have obtained statements from numerous persons, and have accumulated pertinent documents, all relating thereto, and that testimony pertaining to said matter has been given before grand juries in the Southern District of New York and in the Eastern District of Pennsylvania, and that this testimony and evidence will reveal a great deal more concerning these circumstances than was shown by the evidence which was permitted to be adduced in the said trial, where the indictment was predicated on charges of corruption in the Fox bankruptcy proceedings.

Your petitioners are informed and believe and on such information and belief state, that, among other things, it will appear from these statements and evidence that Kaufman did not have funds to make the Stokley loan until he received money from Universal Oil Products Company in the summer of 1935, and that the amount received was in the sum of $25,000; that this money was used in part

to make the Stokley loan; that Kaufman did not render any services in the Root case, and that he did not render any legal services at all for Universal during the period in question, and your petitioners say that, unless the circumstances are otherwise explained, it is reasonable to infer that the said loan was made as a step in carrying out a plan or intent by Universal to corrupt justice or at least to unduly and improperly influence this Court in its decisions in the *Root* cases.

X.

In the indictment trial, the Hon. Joseph Buffington, former senior Judge of this Court, took the stand as a witness for the government and testified, among other things, that he was then in his 86th year; that he sat with Judge Davis as a Judge of the Court of Appeals from 1920 to 1938; that he had known Morgan S. Kaufman and his brother, David, for fifteen or twenty years; that David Kaufman had an apartment at the Bellevue Stratford Hotel in Philadelphia, where Judge Buffington resided; that he, Judge Buffington, had frequently seen Judge Davis and Morgan Kaufman in that apartment; that in the years 1935, 1936, 1937, and 1938, he was totally deaf in his left ear and that he could hear somewhat with his right ear but was very much embarrassed by his lack of hearing; that he could hear only with great difficulty. He further testified that during the year 1935, and for several years thereafter, he was very anxious about his eyes and that his eyesight was such that he could not read newspaper print for two or three years; that he was suffering from a cataract on his right eye which grew worse and which was operated on in 1939; that during the years 1935 to 1939, he

used a couple of powerful magnifying glasses but that he could only see imperfectly through his right eye; that during the years 1935, 1936, 1937, and 1938, he did not have any law clerk or anyone else to look up law for him; that all briefs and matters that came before him had to be read by himself with his own eyes; that he did not have anyone to read the records or briefs to him; that he relied a great deal on Judge Davis.

XI.

Although the trial of this indictment did not result in a verdict, nevertheless, evidence was adduced and testimony given tending to show corruption in five opinions of this Court, written by Judge Davis, arising out of the Fox bankruptcy in the period beginning in 1936, which was the year immediately following the decision on appeal in the *Root* cases.

XII.

Your petitioner respectfully show to this Court that the ends of justice and the good reputation of this Court require that every fact and circumstance tending to throw additional light upon the grave question of whether its opinion and decree in the *Root* cases were obtained by fraud or corruption or undue influence or were tainted therewith, should be discovered and made available to this Court and to your petitioners, as friends of the Court, in order that such further steps may be taken as may be deemed appropriate by this Court for its own protection and to avoid grave injustice to those whose interests were adversely affected by its decision.

PRAYER.

Based upon the matters hereinbefore alleged, your petitioners, as such *amici curiae*, respectfully pray:

1.

That this Court, in some appropriate form, request the United States Department of Justice to make available to this Court and to your petitioners the records, documents, and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries, or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the question whether there was such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the decrees rendered by this Court in the above-entitled causes on June 26, 1935; and also to request (if such request be necessary) the United States Attorney General or the United States District Courts in charge of the grand jury proceedings hereinbefore described in the cities of New York and Philadelphia, directed to the same subject matter, to make available to this Court and to your petitioners a stenographic transcript of such proceedings.

2.

That based either upon the facts now known as hereinbefore stated, or on such facts and such further facts as may be developed pursuant to the foregoing Prayer No. 1, this Court appoint a Master with authority to examine, investigate, and to make and report to this Court his findings and conclusions concerning the relationship and dealings between Universal Oil Products Company, Morgan S. Kauf-

man and Judge Davis and any and all persons acting for or on behalf of any of them in connection with these causes, and the entire subject matter of the prosecution and disposition of these causes; that such Master be authorized and directed to make the requests specified in above Prayer No. 1, if the Court shall not have already done so; that he have power to issue subpoenas on the request of the parties interested or upon his own motion; that he have power to administer oaths and all the powers common to Masters in the Federal Courts; that he rule upon and, for the time being, determine (subject to the final action of the Court) all questions of evidence and of procedure which may arise before him; that he examine witnesses himself or permit them to be examined and cross-examined by these petitioners and by Universal within such reasonable limits as he in his discretion may impose; that he have power to issue subpoenas *duces tecum* and that he promptly report to the Court for its action any matters that he may think proper for such report; that he may thus take evidence and proceed in any district of the United States which he may think proper; that he proceed to his final report with all convenient speed; and that his reasonable fees and expenses be paid in the first instance by these petitioners and be ultimately taxed against these petitioners or Universal as the Court may direct.

3.

That the Court make such other or further order in the premises, either in its own interest thereon, or for the benefit and relief of the petitioners, in respect of their collateral

interests as set forth in Paragraphs V and VI herein, as to the Court shall seem meet and proper.

4.

That Universal be ordered by this Court to make answer to this Petition, if it chooses so to do, within ten (10) days after the filing of this Petition and the service thereof upon counsel for Universal in these causes.

ARTHUR C. DENISON,
J. BERNHARD THIESS,
THORLEY VON HOLST,
As Amici Curiae.

June 18, 1941.

EXHIBIT 3

Brief of Amici Curiae in the Foregoing Petition

As stated in the oral discussion, this subject matter has two aspects: *First*, that of the public interest, as crystallized in the direct interest of the court in the integrity of its former proceedings, and, *second*, that of the private interest of certain defendants in other cases where the Root decree is being urged as an adjudication or as a precedent, or both. This same double aspect is now more formally presented. So far as Root itself is concerned, it has settled its case, is represented by other counsel than those who appeared for it at the trial, and has not authorized any action.

I.

To the suggestion that there should be an investigation in the interest of the court itself, it would not have been seemly that counsel for Universal should make any objection; and they have not done so.

A court never loses jurisdiction to inquire into the question of fraud and corruption in its own decrees. Black on Judgments, Second Edition, Section 391. See also *Noonan* v. *Bradley*, 79 U. S. 121 (p. 129) where Mr. Justice Clifford emphasized the exception in cases of fraud, to the general rule that jurisdiction is lost when the mandate is sent down.

While the precedents, prior to *United States* v. *Manton*, 107 F. (2d) 834, are fortunately almost entirely limited to instances where fraud has been perpetrated by the parties alone, it is axiomatic that the same principle would apply where the court itself has been also involved.

The underlying principle is well expressed in *Rowland v. Kreyenhagen*, 24 Cal. 52, 84 A.L.R. 595-6, where it was stated:

> "... In contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity. If, under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree."

The question now confronting the Court is not whether the Root decision was right or wrong, but the much more fundamental question of whether it was tainted with corruption. This was expressly held in *United States v. Manton*, 107 F. (2d) 834, where the Court of Appeals said (p. 846):

> "... Judicial action, whether just or unjust, right or wrong, is not for sale; and if the rule shall ever be accepted that the correctness of judicial action *taken for a price* removes the stain of corruption and exonerates the judge, the event will mark the first step toward the abandonment of that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago, that the judge must be 'perfectly and completely independent with nothing to influence or control him but God and his conscience.'"

Elaboration and argument cannot increase the probative effect of the substantial facts already known, viz., that Universal paid a sum of money to Kaufman while this case was pending, apparently purporting to be for services as an attorney in some connection with this case; that Kaufman

never appeared in this case and is not known to have performed any services whatever as attorney in connection therewith; that while the case was pending, both before and after the decision by this court, Judge Davis was soliciting, purportedly for a friend and relative, financial favors from Kaufman; and that shortly after the case was finally decided Kaufman paid $10,000, purportedly as a loan to this relative, upon the supposed security of a mortgage upon property in Florida which Kaufman had never seen, and that Judge Davis had charge of the closing of this loan. These facts are to be viewed also against the background attending Judge Davis which is alleged by the United States in the Fox cases. Whether such a situation is one which will move the court to proceed into a full investigation, is for the court to decide.

In the question of procedure, commonly the court might wait somewhat upon the action of the Department of Justice; but the Department has perhaps decided that the Root affair is barred by the statute of limitations. In any event, the United States has chosen to bring to trial the situation which arose in the Fox bankruptcy matters, and it is therefore at least uncertain whether criminal proceedings will ever be brought based upon such a conspiracy as there may have been to obstruct justice in the Root cases. Nevertheless it is apparent that the machinery available to the Department of Justice through the Federal Bureau of Investigation or otherwise and to the Grand Juries is far more likely to have elicited all of the pertinent facts than any original investigation which could now be conducted; and it follows that the natural first step in any investigation now to be made by or for this court, would be to make available such information as has been thus elicited.

As to procedure, our prayer is, first, that the court, having determined upon an investigation, provide for making this existing information available to it as the basis of determining its further steps, and our suggestion is that, if the court hesitates to make any such order initially, it may well delegate authority in this particular to a Master, to be appointed to represent the court and conduct the investigation in its behalf. To a request by such a Master it seems probable that the Department of Justice and the District Courts would gladly accede. Subsequent proceedings before the Master might very likely be guided by the information so elicited.

This Court has undoubted power to request the governmental departments to make avialable to it, or to those designated by it, the evidence which they have accumulated in the course of their investigations. As Judge Kirkpatrick pointed out in *In re Grand Jury Proceedings*, 4 F. Supp. 283 (p. 284):

> "The rule of secrecy [in Grand Jury proceedings], it will be noted, was designed for the protection of the witnesses who appear and for the purpose of allowing a wider and freer scope to the grand jury itself, and was never intended as a safeguard for the interests of the accused or of any third person. The fact that the grand jury has adjourned and been discharged has often been considered as one reason for abandoning secrecy as to its deliberations. It is, however, not the only circumstance which may move the court, nor is it essential to the exercise of its discretion. It yields to the general consideration whether the ends of justice will be furthered by the disclosure. In every case the court is called upon to balance two policies, the one requiring secrecy, the other disclosure."

In *Goodman* v. *United States*, 108 F. (2d) 516, the Court of Appeals for the Ninth Circuit said (p. 521):

> "It is proper to add that the court may at any time in the furtherance of justice remove the seal of privacy from grand jury proceedings." (Citing cases.)

Whereas at the hearing before this Court on June 5th, other courses besides discovery were suggested, we submit that the first step must necessarily be that of marshalling all the facts, and that no proper decision can be made either by this Court or by any of the affected parties until these facts are fully known. Although this is a Court of appellate, and not of original, jurisdiction, there is no doubt that it has power and authority in a matter of this kind to consider evidence bearing upon the question of fraud. This was held in *Dakota County* v. *Glidden*, 113 U. S. 222, in which case the Supreme Court received and considered certain transcripts of proceedings of the Board of Commissioners of Dakota County, not contained in the record before it, showing that, subsequent to the trial in the District Court, the cause of action had been compromised and settled and had become moot. The Supreme Court said (pp. 225-226):

> "It is said that to recognize this compromise and grant this motion is to assume original instead of appellate jurisdiction.
>
> "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal.
>
> "It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the Court must be that, not found

in the transcript of the original case, because it occurred since that record was made up.

"To refuse to receive appropriate evidence of such facts for that reason is to deliver up the court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal the means of inflicting gross injustice."

That part of your petitioner's prayer as *amici curiae* that asks the Court to appoint a Master with appropriate powers to conduct the inquiry is authorized by the procedure followed in *American Wood Paper Company* v. *Heft*, 131 U. S., Appendix xcii. In that case on the appeal to the Supreme Court from the Circuit Court for the Eastern District of Pennsylvania, it was represented to the Supreme Court that the appeal should be dismissed because there had been a settlement between the parties and that the appeal was being prosecuted

". . . not to determine any real controversy between the parties to the record, but to obtain a decree on which to found an application for an injunction against persons really interested, adversely to the appellants, but not parties to the record, and among them against the person in whose behalf the motion is made."

The Supreme Court thereupon entered a rule to show cause why the appeal should not be dismissed and gave leave to both parties "to take depositions on sufficient notice before any Commissioner of the United States, in support of the rule and against it." The power of an appellate tribunal to authorize the taking of testimony before a Commissioner necessarily presumes authority and jurisdiction to appoint a Master with appropriate powers, and for obvious

reasons, in the instant case, the investigation should be in the hands of one with authority to rule on evidence, to issue subpoenas, to report his findings and conclusions, and to exercise all the customary powers of a master in chancery.

After full consideration, it seems to us premature to suggest any specific action in the *Root* cases, with reference to the opinion of this court or their present moot status in the District Court. If it should be determined that the conduct of Universal in the subject matter of this litigation was tainted with corruption, accomplished or attempted, that would be the end of the matter. It is not conceivable that this court would then take any action other than to direct that the former opinion be withdrawn and the bills be dismissed, for what would be (charitably) called "unclean hands."

Upon this (the first and general) aspect of the matter, Universal's suggestion that the case be reargued is in effect to say, "Let us forget all about the corruption, and take a *nice, fresh, clean* start.". This suggestion will not appeal to this Court.

II.

To the suggestion, made on the former oral discussion, whether the court should now take hold of the *Root* cases and make some proper order therein in view of the fact that they have become moot, Universal had no response except to offer to consent to a reargument in this court *upon the existing record*—an offer which as we then pointed out, and as is still the fact, no one is in position to accept, for Root, to whom alone the offer could be tendered, has settled its case. This suggestion was perhaps inspired by observing that this had been the course adopted by the

courts of the Second Circuit in the *Manton* cases; but in them the situation was totally different, and that action furnishes no precedent for action here. It will be noted that in each of the five civil cases mentioned in the opinion in the *Manton* case (107 F. (2d) 834), in which five cases corruption was shown, the *defendant* was the guilty party; and obviously any relief which could be granted *to the plaintiff* therein, after the Judge's disqualification had been shown, was necessarily limited to the reargument of the case on the merits.* It is equally obvious that where the *plaintiff*, in an equity suit, has corrupted or attempted to corrupt the court, or has otherwise obstructed justice, different legal consequences result, based upon the maxim that he who comes into equity must come with clean hands.

If the *Root* decision was corruptly obtained, then, under the decision of the Supreme Court in *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, *even though the Root decision were right*, the Court *sua sponte*, would vacate the decrees and dismiss the bills, and the plaintiff would be forever barred from relitigating the cause of action involved in the *Root* case, either in this Court, or in any other where the decree had been set up as *res judicata* or as a precedent.

In the *Keystone* case, it appeared that in a prior case against the Byers Machine Company, the plaintiff had fraudulently suppressed evidence of a defense in the nature of a prior use by one Bernard Clutter. In the *Byers* case, the plaintiff prevailed in the lower court and on appeal, and in a subsequent case against the General Excavator Company, plaintiff asserted the *Byers* decree as a precedent in

*In four of the cases rearguments were granted. The fifth (Smith v. Hall) had been finally affirmed by the Supreme Court.

its Motion for Preliminary Injunction. In the *Excavator* case in affirming the action of the Court of Appeals for the Sixth Circuit, which had dismissed the complaint for unclean hands, the Supreme Court said (p. 247):

> "... While it is not found, as reasonably it may be inferred from the circumstances, that from the beginning it was plaintiff's intention through suppression of Clutter's evidence to obtain decree in the *Byers* case for use in subsequent infringement suits against these defendants and others, it does clearly appear that the plaintiff made the *Byers* case a part of its preparation in these suits. The use actually made of that decree is sufficient to show that plaintiff did not come with clean hands in respect of any cause of action in these cases."

The *Keystone Driller* case emphasizes the jealousy with which courts protect their own integrity, and shows that tampering with the processes of justice must be dealt with by visiting upon the wrongdoer the most drastic penalties for his offense.

Respectfully submitted,

ARTHUR C. DENISON,
J. BERNHARD THIESS,
THORLEY VON HOLST,
As Amici Curiae.

EXHIBIT 4

Petition of Arthur G. Logan as Amicus Curiae

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, Arthur G. Logan, of Wilmington, Delaware, as amicus curiae, respectfully shows:

1. That he is a member of the Bar of this Court and files this petition as amicus curiae pursuant to the permission of this Court announced in open court in a preliminary and informal hearing on June 5, 1941.

2. That he has read the Petition and Brief of Arthur C. Denison, J. Bernhard Thiess, and Thorley Von Holst filed herein as amici curiae, and incorporates the same herein by reference and adopts the allegations, prayers and arguments contained therein. He states further that it is not only his intention that this petition shall not charge, intimate or suggest that there was any unprofessional or unethical acts of any kind or degree on the part of any one of the counsel of record for Universal Oil Products Company in the above-captioned causes, but that he is of the belief that none of said counsel of record knew of the employment of Morgan S. Kaufman by Universal Oil Products Company to act in the above-captioned causes.

3. Your petitioner was counsel of record for Root Refining Company below and in this Court until the time said Root Refining Company settled with Universal Oil Products Company, hereinafter referred to as "Universal."

4. Your petitioner is attorney for Eastern States Petroleum Co., Inc., which is vitally interested that a proper

investigation be made to determine whether there was any fraud, corruption, obstruction, or distortion of justice tainting or invalidating the decrees entered by this Court in the above-entitled causes on June 26, 1935, for the following reasons:

During June of 1935, Eastern States Petroleum Co., Inc., a Delaware corporation, (hereinafter referred to as "Eastern States") was operating a refinery at Houston, Texas, and was planning to build a gasoline cracking unit and to operate the same in connection with said refinery. At that time it was studying various cracking processes to determine whether or not a license should be taken under any particular process and to determine the type unit to build. Universal had been urging said Eastern States to take a license from it, build a Dubbs unit and use the Dubbs Cracking Process, covered by United States Letters Patent No. 1,392,629, issued to Carbon P. Dubbs, assignor of Universal. Immediately after the decision of this Court rendered on June 26, 1935, an agent of Universal had a discussion with the President of Eastern States and thereafter, on July 3, 1935, a letter was written by Universal to Eastern States urging Eastern States to build a Dubbs unit and practice the Dubbs Cracking Process, covered by said United States Letters Patent owned by Universal. Said letter set forth, inter alia:

"*Patents and Patent Protection*

"A. As a result of our concentration on the oil cracking and treating art, we have built up a formidable patent structure consisting of thousands of patents and applications under which our licensees receive full protection. All of our more important

inventions have been fully covered by patents and patent applications in the United States and foreign countries.

* * * * * *

"In this connection, a decision of far-reaching importance was rendered in April, 1934 in the United States District Court of Delaware in our suit against one of our own licensees, the Root Refining Company, for the operation of an infringing and unlicensed cracking process of the so-called Winkler-Koch type. The final paragraph of the Judge's opinion of the Court reads as follows:

> "'I conclude that the patents in suit are valid, that the charge of infringement has been sustained, and that the plaintiff is entitled to a decree, with injunction and accounting.'
>
> "An appeal from the decision was taken to the United States Circuit Court of Appeals by the Root Refining Company and on Wednesday of last week this Court unanimously affirmed the opinion of the District Court. For your information, we are attaching herewith the printed copy of this opinion.
>
> "It is our intention to move rapidly against others who have failed to recognize our rights in this field which we have established and will endeavor to enforce through the courts for the protection of our licensees."

Annexed to said letter was a printed copy of the opinion filed on June 26, 1935, in the above-captioned causes which had been written by Judge Davis. Not only did said Universal write as aforesaid to Eastern States, with an implied threat to sue in the event Eastern States built a cracking unit and did not take a license from Universal.

but said Universal wired to all its licensees throughout the United States as follows:

"HAPPY TO INFORM YOU FEDERAL CIRCUIT COURT OF APPEALS PHILADELPHIA UNANIMOUSLY CONFIRMS VALIDITY OF DUBBS CLEAN CIRCULATION PATENT AND EGLOFF MULTIPLE COIL SELECTIVE CRACKING PATENT AND DECLARES BOTH INFRINGED BY OPERATION SO CALLED WINKLER KOCH UNITS OUR SUIT AGAINST ROOT REFINING COMPANY STOP EXPECT NOW TO MOVE VIGOROUSLY FORWARD IN OUR PENDING SUITS AGAINST OTHER INFRINGERS AND TO INSTITUTE SUCH FURTHER SUITS AS NECESSARY IN PROTECTION YOUR AND OUR INTEREST STOP COPY OF OPINION WILL BE MAILED YOU."

Universal also caused stories of said opinion to be printed in oil trade journals throughout the United States and made known the decision of this Court and the opinion of Judge Davis throughout the oil industry, including financial circles interested therein.

By virtue of the publicity Universal caused to be given to the decision of this Court, it became difficult for Eastern States to complete financial arrangements to build a cracking unit without a license from Universal. Therefore, based, in part, upon the threats contained in the letter from Universal of July 3, 1935, and the difficulties which Eastern States found would exist in financial circles if it did not have a license from Universal, and in the belief that said decision of this Court had been honestly and properly rendered, Eastern States took a license from Universal and agreed to pay Universal royalties for the use of said United States Letters Patent No. 1,392,629, issued to Carbon P. Dubbs, and United States Letters Patent No. 1,537,593, issued to Gustav Egloff, assignor of Universal.

Thereafter, Eastern States found that said Dubbs Cracking Process was not efficient and that it was impossible to obtain through the use of said Process yields and quality of products which it had been led to believe could be obtained. Thereupon, Eastern States refused to pay royalties and sought to terminate said License Agreement. Universal refused to allow it to terminate said License Agreement and brought suit for royalties in the Superior Court of the State of Delaware, in and for New Castle County, said suit being Universal Oil Products Company vs. Eastern States Petroleum Co., Inc., No. 49 May Term, 1937. In the belief that it had been led to enter into said License Agreement through false representations concerning yields and quality of products, Eastern States filed a Bill of Complaint in the Court of Chancery of the State of Delaware, in and for New Castle County, entitled Eastern States Petroleum Co., Inc. vs. Universal Oil Products Company, and prayed that said License Agreement be cancelled. Thereafter, under date of September 1, 1940, the parties entered into a settlement agreement under which said License Agreement was terminated and Eastern States obtained a release from all claims for royalties up to September 1, 1940. For this release Eastern States surrendered a claim against an affiliate of Universal for a sum in excess of $2,000,000.00. As part of the settlement agreement Eastern States also agreed that in the event it was using any of Universal's other patents, it would take a license thereunder. Arbitration proceedings are now pending to determine this question.

Your petitioner has been advised, informed and believes and therefore avers that, but for the decision rendered by this Court on June 26, 1935, Eastern States would not have

entered into the License Agreement with Universal, would not have been obligated to surrender as consideration the claim aforementioned in excess of $2,000,000.00, and would not have entered into the present agreement it has with Universal to take a license under any patents it may now be using. Your petitioner therefore avers that in the event the judgment rendered by this Court on June 26, 1935, was obtained by fraud, corruption, obstruction, or distortion of justice by Universal, then Universal is accountable to Eastern States for the damage occasioned to Eastern States through the use made by Universal of said judgment to induce Eastern States to enter into the License Agreement with Universal as aforesaid.

WHEREFORE, your petitioner joins in the prayers set forth in the petition of Arthur C. Denison, J. Bernhard Thiess, and Thorley Von Holst, as amici curiæ, and prays further that the information and evidence referred to therein be made available to your petitioner, and for such other and further relief as to this Honorable Court may seem meet.

ARTHUR G. LOGAN
Arthur G. Logan as Amicus Curiæ.

June 25, 1941.

EXHIBIT 5

Answer of Universal Oil Products Company to Petition and Brief of Arthur C. Denison, J. Bernhard Thiess and Thorley Von Holst as *Amici Curiae*

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The answer of Universal Oil Products Company, plaintiff-appellee in the above entitled case, hereinafter referred to as Universal, to the petition and brief of Arthur C. Denison, J. Bernhard Thiess and Thorley von Holst as *amici curiae* respectfully shows:

I. Universal admits the allegations of paragraph IV of said petition except that it denies that any agreement had ever been consummated for the dismissal of the above entitled causes. Universal alleges that there is outstanding a decree in the above entitled causes, and that said causes, as alleged in said petition, are still pending in the United States District Court for the District of Delaware.

II. Universal admits the allegations of paragraph V except that, in view of the letter written to Judge HOLLY by Universal's counsel and hereinafter quoted from, Universal will not raise *res adjudicata* on any appeal from Judge HOLLY's decision. Said letter was sent on June 16, 1941 by Alexander F. Reichmann of Chicago, who represents Universal as chief counsel in the said *Globe* case, to Judge HOLLY before whom that case is pending. The letter recited the reason for the delay in the sending of the same, namely, Mr. Reichmann's absence, and the proceedings before this Court on June 5, 1941, and the letter of petitioners of June 2,

1941, upon which the said proceedings were based, and also the offer made on behalf of Universal at said hearing that it was willing to have this Court reconsider the above entitled cases on the record and the old briefs supplemented, if desired, by further argument, and that all counsel for Universal felt that Judge HOLLY should be advised of said proceedings while he still had the case under consideration. The remaining pertinent parts of the letter are as follows:

> "Counsel for Globe, while not rejecting the offer, did not accept it.
>
> "The upshot of the matter was that the Court suggested to counsel for Globe that if they desired they file some formal paper specifying exactly what remedy they wanted, and which they thought the Court had authority to give, and Universal would then be given an opportunity to reply. Up to the present writing, no further steps have been taken by counsel for Globe.
>
> "Under the circumstances, and especially in view of Universal's offer to have the old decision reconsidered, counsel for Universal would prefer that in reaching your decision in the Globe case, you pay no attention to the decision of the Circuit Court of Appeals as a precedent, or as having any other effect in the Globe case beneficial to Universal, until this matter has been completely disposed of. We desire, however, that full weight and credit be given to Judge Nields' decision, if, in the determination of the case, you wish to consider it."

Since this letter was written both parties have written Judge HOLLY that they prefer to have him decide the case on the record already made, Globe's letter adding "leaving other questions for future determination".

III. Universal admits the allegations of paragraph VI, and believes that the allegations of paragraph VII are true.

IV. Universal has no knowledge as to the allegations of fact, as distinguished from inferences and insinuations, of paragraphs VIII, X and XI except as the same may be gathered from a transcript of the proceedings in the trial therein referred to, but alleges that the said paragraphs do not fully set forth all the facts in respect to the matters referred to in said paragraphs.

As to the allegations of fact of Paragraph IX of the petition, Universal alleges that a thorough investigation was made by the Federal Bureau of Investigation and the Department of Justice in Grand Jury proceedings of Mr. Kaufman's relation to the *Root* case in connection, as Universal understands, with an investigation of all cases in which Mr. Kaufman had been interested in the Circuit Court of Appeals. Universal has no knowledge as to the other allegations of fact in Paragraph IX except as hereinafter specifically set forth.

V. Morgan S. Kaufman, referred to in the said petition, was retained as an attorney for Universal in the year 1932 prior to the trial of the above entitled action, by the then general patent attorney of Universal who had authority to employ him, under a retainer which required him to make his professional services available to Universal in the *Root* case and all cases then pending or which might be subsequently brought, and disenabled him from representing any other company or party whose interests might be antagonistic to those of Universal. He was continued under such retainer until 1938. His employment did not end as alleged in said petition "about the time the Root cases

were decided in the Court of Appeals." Although he held himself ready and willing to render such services as Universal might require of him, his services were not utilized to any substantial extent prior to the latter part of the year 1935. In October of 1935 (not "in the summer of 1935" as alleged in said petition), after the Supreme Court of the United States had denied a petition for certiorari from the decision of the Circuit Court of Appeals rendered on June 26, 1935, he was paid the sum stated in said petition as and for his said retainer in said *Root* case and pending matters for a period of approximately three and one-half years. Prior to such payment the amount thereof was submitted by Universal to its two general counsel and received their approval before it was made. Both of these men are eminent members of the New York Bar and neither of them were attorneys of record in the above entitled cause (although one of them had taken an active part therein).

Thereafter Mr. Kaufman was consulted in the matter of the institution of certain suits proposed to be brought by Universal on the patents in suit in the above entitled cause against two of its largest infringers, both subsidiaries of Cities Service Company, and he acted as local attorney in one of said suits—against Crew-Levick Company—in the Eastern District of Pennsylvania, and was and has continued to be the attorney of record for Universal in such suit.

Universal and none of its officers or attorneys ever intended, thought, expected or believed, nor does it or they now believe, that he would do, or ever did, anything to improperly or illegally affect the judgment, opinion or action of any judge before whom the above entitled cases were

pending, or any other case that might be instituted at an
time. Universal and none of its officers or attorneys eve
intended, thought, expected or believed, nor does it or the
now believe, that any part of any moneys paid by Universa
to Mr. Kaufman would be or was, either directly or in
directly paid to anyone for the purpose of influencing opin
ion or action of any such judge. Universal and none of it
officers or attorneys ever knew or had any intimation, unti
after the investigation conducted by the Department o
Justice of the United States which led up to the indictmen
referred to in the petition, that Mr. Kaufman had made o
contemplated making or was in any way interested in mak
ing a loan to Charles L. Stokley or any other person at th
instigation of Judge DAVIS or anyone else, or had or in
tended to have any business or other dealings with an
Judge before whom the above entitled cases might come
which would in any way affect the judgment of the latter
Universal unqualifiedly refutes the suggestion or implica
tion that Mr. Kaufman was retained for any improper pur
pose.

VI. The inferences and insinuations contained in th
last two sentences of paragraph VIII and the last sentenc
of paragraph IX of said petition are wholly unjustified an
are absolutely untrue, as the following facts and circum
stances demonstrate.

(a) These inferences and insinuations are based largely
if not wholly, upon the said Stokley loan, about which Uni
versal, as already stated, neither knew nor had any intima
tion of until after the investigation above referred to.

Petitioners have omitted to refer to some other evidenc
which Universal is advised was adduced on the trial of sai

indictment and which, it is submitted, destroys the inference (if, indeed, any may be drawn, which Universal denies) which said petition seeks to draw that the said Stokley loan influenced the decision of Judge DAVIS in the *Root* case. Such testimony showed that at the time the agreement with the said Stokley was made, Mr. Kaufman was attorney in three cases pending in the Circuit Court of Appeals to which Universal was in no way related. For the convenience of the Court extracts from such testimony are set forth in an appendix.

Moreover, the Judge who presided at the trial of said indictment charged the jury in regard to said loan as follows:

> "The Jury has heard certain testimony in regard to a loan made by the defendant Kaufman to Stokley, a relative of Judge Davis, which was negotiated in part at least by Judge Davis and secured by mortgage on certain Florida real estate. In so far as the evidence discloses this was a bona fide loan made upon ample security and such testimony was admitted in evidence only for the purpose of showing the association of the defendants on trial, and the jury must consider such evidence only in that connection."

(b) Universal is reliably informed that, contrary to the allegations of the said last sentence of paragraph IX of said petition, Mr. Kaufman, entirely apart from any compensation received from Universal, had ample funds with which to make the said Stokley loan.

(c) Universal directs attention to some other circumstances, all of which were known to petitioners before the said petition was filed, and which, it is submitted, refute the said inferences and insinuations. The Root Company was

using an apparatus for cracking oil to make gasoline, sup
plied by the Winkler Koch Engineering Company
Wichita, Kansas. Similar apparatus of said Winkler Koc
Company had been supplied to and was being used by othe
refiners. It was known that the use of such apparatus wa
asserted to infringe patents of Universal, notably the Dubb
patent and the Egloff patent referred to in the petition.* Th
Root cases were based on the infringement of these patent
These users thereupon banded together to defend pate
suits which might be brought against any of them for in
fringement of Universal's patents or those of any othe
patent owner. They formed an association which some
them termed the "Patent Club". The members of such a
sociation were those mentioned in Paragraph VI of th
petition herein, plus the National Refining Company an
the Root Refining Company. In the *Root* cases the mo
active attorneys for the defendant were the petitioner
Over $275,000 was expended in the defense of the *Ro*
cases, which amount was supplied by the members of th
Patent Club.

Subsequent to the decision of the Circuit Court of A
peals and the denial of a certiorari by the Supreme Cou
in the *Root* cases, Universal consented at petitioners' r
quest to try the next case involving the same patents again
a member of the Patent Club located in the District
Kansas. This suit was against the National Refining Com
pany. The case was set for trial during the latter pa
of April, 1937; and was settled a few days before the tri

*The Dubbs patent expired in 1938, and the Egloff patent w
expire in 1942. The Dubbs invention was a fundamental one a
the patent a pioneer. The Egloff patent covered a later devis
process which included the fundamental characteristics of th
Dubbs patent.

was scheduled to begin, the defendant paying for past infringement and taking a license for the future. Universal then proceeded with the case which it had pending, as stated in the petition, against the Globe Oil and Refining Company (another member of the Patent Club) in the Northern District of Illinois. That suit came on for trial before Judge HOLLY and was tried at length and fully on the merits. The case is now awaiting decision. Universal prosecuted the last two mentioned cases in the mid-west notwithstanding that it then had pending in the District of Delaware a suit against the Skelly Oil Company (referred to in paragraph V of the petition), which company was the largest infringer of any member of said Patent Club, and which case it was then in a position to press and prosecute and to assert *res adjudicata* to the same extent as in the suits against the other members of the Patent Club. It also had pending at that time a case in the District of Delaware for infringement of the said Dubbs patent against the Empire Refining Company, and in the Eastern District of Pennsylvania a case against the Crew-Levick Company. Both of these companies are subsidiaries of the Cities Service Company and are not members of said Patent Club. These two latter companies were among the largest infringers of said Dubbs and other Universal patents. Universal was in a position to prosecute both of these suits in preference to those which it did press for trial as aforesaid in the District of Kansas and actually try in the Northern District of Illinois. Thus Universal twice placed the patents which were adjudicated in the *Root* cases in jeopardy in two western districts (each in a separate circuit), when it had at hand the opportunity to press to final conclusion the said suits in the Third Circuit, which would

have been its natural course had the inferences and insin
ations of petitioners above referred to any foundation
fact whatever.

In addition, twice *after* the *Root* cases had been decid
by the Circuit Court of Appeals, Universal *consented* t
when it could have *opposed*, orders being made by the Ci
cuit Court of Appeals permitting applications to be ma
by the petitioners on behalf of the Root Company to app
to the District Court for leave to open the decrees in tho
cases. The first of these applications was for permissi
to present a claim that the *Root* cases had abated prior
the trial and that the decree therein and all subsequ
proceedings were null and void. The second application w
for permission to assert in such suits a new defense of pri
inventorship on the part of one Behimer.* Universal,
course, could have opposed both of said motions in t
Circuit Court of Appeals in the first instance and t
Root Company would have been under an obligation
satisfy that Court that each application had sufficient me
to justify its being granted. If petitioners' said inferenc
and insinuation were warranted, it is wholly unreasonab
to assume that Universal would have *consented* to t
making of the said orders without a contest rather tha
have insisted upon having the sufficiency of the applic
tions determined by the Circuit Court of Appeals.

---

*This defense was asserted and vigorously contested in t
Globe case. It could have been raised in the *Root* cases on t
Dubbs patent, because patents setting forth the Behimer proce
and having filing dates preceding Dubbs's date were offered in e
dence in the *Root* cases. The record in those cases also contain
the interference proceedings between Dubbs and Behimer whi
gave the dates for conception and reduction to practice for eac
respectively.

(d) The compensation paid to Mr. Kaufman was made by a regular check of Universal, was entered on the records of the company and reference made therein to the fact that it was in connection with the *Root* cases, and pending matters.

VII. The prayers of the petition will now be discussed.

(a) While, as stated on the oral argument, Universal does not feel that it is within its province to take any position with respect to an investigation by the Court to determine for its *own* purposes whether or not any fraud has been perpetrated upon it, Universal does feel that it should point out to the Court that the petition, except in respect to the inferences and insinuations which have been previously discussed, is devoid of any facts which would justify the belief or the making of a charge that Universal has been a party to any such plan or intent as petitioners "infer" in the last sentence of paragraph IX or had any knowledge or intimation thereof.

(b) Should this Court determine to make an investigation for its own purposes, Universal does not feel that it would be just or fair to commit any investigation to these petitioners or that they be permitted to be a party to the same. They represent defendants in suits brought by Universal and frankly assert that they seek the aid of this Court in the hope that they can obtain information which may possibly enable them to defeat Universal in those cases on the ground that Universal has been guilty of unclean hands. To permit the petitioners to be clothed with the inquisitorial powers of this Court to serve the ends of their clients in other cases would be contrary to the settled policy of the Supreme Court, for the alleged inves-

tigation would become what Mr. Justice HOLMES characterized in *Ellis* v. *Interstate Commerce Comm.*, 237 U. S. 434, 445, as "a fishing expedition * * * for the chance that something discreditable might turn up."

Such an "undertaking" was said in *Jones* v. *Securities Exchange Commission*, 297 U. S. at 26, to be one "which uniformly has met with judicial condemnation." For this proposition a number of cases are cited, all of which deal with public officials or governmental bodies who are acting or purporting to act for the public welfare. The rule, of course, should apply with more rigor to individuals seeking to be clothed with official power, in furtherance of their own private ends. There is, of course, a proper and familiar procedure open to petitioners on behalf of those defendants which they represent in the particular cases to which they are parties, for asserting the alleged defense of unclean hands.

(c) Universal is advised by counsel that to grant the first prayer of the petition to counsel for private litigants to serve the interests of their clients would be unjustified either as a matter of law or public policy.*

X. At the oral argument in this matter, counsel for Universal offered to consent to the recall of the mandate of this Court in the *Root* cases to enable the Court to recon-

*The authorities cited in the brief annexed to the petition in reference to removing the privacy of Grand Jury proceedings have no applicability to a case where a private litigant seeks access to them for private purposes. They relate only to cases where the Government needs in the public interest the testimony taken before a Grand Jury, or justice to one who claims that he has been indicted improperly requires that the seal of secrecy be broken. (*U. S.* v. *Farrington*, 5 Fed. 343, where an attorney representing creditors presented the cases *sub judice* to the Grand Jury, etc.)

sider the cases and to waive or in any other manner overcome any technical considerations which might stand in the way of such reconsideration. This offer Universal now repeats.

Respectfully submitted,

UNIVERSAL OIL PRODUCTS COMPANY

by H. J. HALLE
President.

THOMAS G. HAIGHT
HUGH M. MORRIS
WILLIAM F. HALL
CHARLES M. THOMAS
Counsel

[Verified by H. J. Halle, July 9, 1941.]

APPENDIX.

On page 1465 of the Transcript, Mr. Kaufman testified on cross examination as follows:

> "Q. And just about that time" (when Kaufman agreed to make the Stokley loan) "you had a case coming on before Judge Davis, did you not, sir, the Wiener case?
>
> "A. Did I have a case? I had several cases there.
>
> "Q. You had the Wiener case coming on before Judge Davis, did you not?
>
> "A. I had the Wiener case there, yes, sir. I was an associate."

And on page 1471 of the Record, Mr. Kaufman, still on cross examination, testified as follows:

> "Q. Was this case—Wiener case—pending when the Stokley loans were made?
>
> "A. It was.
>
> "The Court: Now ask him about the other cases, if there are any.
>
> "*By Mr. Gahagan.*
>
> "Q. And the Kelly-Springfield Tire case v. United States—, was that pending when the Stokley loan was made, sir? (Hands paper to witness).
>
> "A. No, I do not think that was. The argument was held on April 4, 1935.
>
> "Q. When the decision come down, sir?
>
> "Mr. Gray: Wait a minute.
>
> "The Witness: The decision came down——

"Mr. Gray: Just a moment. I understood your Honor to rule that he could not go into those things.

"The Court: Well he has answered no to the question.

"Mr. Gray: I see; I get your Honor's thought.

"Mr. Gahagan: Then I have got the right to show it was?

"The Court: Nobody denies that you have, Mr. Gahagan.

"By Mr. Gahagan.

"Q. Fine—when did the decision come down?
"A. The decision came down November 7th.
"Q. What year, sir?
"A. 1935."

And on page 1476 of the Record, Mr. Kaufman further testified on cross examination as follows:

"By Mr. Gahagan.

"Q. Mr. Kaufman was another case, Ballwood & Company v. Commissioner of Internal Revenue, also pending at or about the time of the Stokley transaction,—sir,—the reargument in that case, I direct your attention o (pointing to sheet)?

"Mr. Gainsburg: Ask a question, sir.

"Mr. Gahagan: There is a question pending.

"(To the Witness) Thirty-six—thirty-two—thirty-five——

"The Witness: What was the question? (Previous question read by the reporter.)

"By Mr. Gahagan: Isn't that right, sir? Wasn't that case pending?

"A. Just a minute; let me look at this, will you? If you will take your hand away I will be able to look at it. Yes, and——

"Mr. Gainsburg: Just answer.

"By Mr. Gainsburg.

"Q. Was it pending? That is the only thing I want.

"A. Just a minute; let me look at this again. It was pending, yes, in 1936.

"Q. All right, sir; that is all—and it was pending in 1935, was it not?

"A. Before I got into it—it pended in 1934—the case was decided by Judge Thompson, I think."

EXHIBIT 6

Answer of Universal Oil Products Company to the Petition of Arthur G. Logan as *Amicus Curiae*

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The answer of Universal Oil Products Company, plaintiff-appellee in the above entitled case, hereinafter referred to as Universal, to the petition of Arthur G. Logan as *Amicus Curiae*, respectfully shows:

I. The said petition sets forth that the petitioner has read the petition and brief of Arthur C. Denison, *et al.* filed herein and "incorporates the same herein by reference and adopts the allegations, prayers and arguments contained therein". It also "joins in the prayers set forth in said petition" and prays that "the information and evidence referred to" in said petition of Arthur C. Denison, *et al.* be made available to petitioner. Universal therefore asks that its answer to the said petition and brief of Arthur C. Denison, *et al.*, together with Paragraph II hereof, be considered as an answer to the said petition of the said Arthur G. Logan.

II. The remaining allegations of the petition have to do with a supposed claim for damages which the Eastern States Petroleum Company, Inc., hereinafter called Eastern States, according to said petition, may have against Universal. It is deemed unnecessary to reply to such allegations further than to state that the cracking unit erected by Eastern States embodied a number of Universal patents

other than the Dubbs and Egloff patents, and the license acquired covered all of Universal's patents; that Eastern States never paid any royalties to Universal; that in the said suit in the Court of Chancery in the State of Delaware Eastern States was defeated in every stage of said proceedings, including a decision by the Master to whom certain of the issues in said suit had been referred; that Eastern States was not led to enter into the license agreement through any false representations by Universal, but, on the contrary, shortly after the execution of the license agreement Eastern States through its President represented to Universal that it had entered into said agreement without regard to the value of the Universal patents, but to secure the benefits which it felt it could derive from its association with Universal; and that said settlement was made only after said report of the said Master.

Respectfully submitted,

UNIVERSAL OIL PRODUCTS COMPANY

by H. J. HALLE
President

THOMAS G. HAIGHT
HUGH M. MORRIS
WILLIAM F. HALL
CHARLES M. THOMAS
Counsel

EXHIBIT 7

Reply Memorandum of Arthur C. Denison, J. Bernhard Thiess, and Thorley Von Holst as *Amici Curiae* on the Filing of the Respondent's Answer to the Petition

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

While the Answer of Universal Oil Products Company, subscribed by its President, H. J. Halle, presents no new fact issue requiring further pleading, we deem it appropriate to address the Court on what seem to us to be the further reasons presented by the Answer requiring the investigation prayed for in the Petition.

The Answer does not either oppose or invite an investigation by this Court for its own purposes as to whether or not there was any fraud or misconduct in the matter of the Root decrees, but it represents to the Court that in any investigation to be conducted, your Petitioners should be excluded on the ground that their interest herein is to conduct a "fishing expedition" for the interests of clients whom they represent in other litigation brought by Universal on the Dubbs and Egloff patents.

The precise form of any investigation is, of course, entirely within the direction of this Court and we have never urged any other position. However, the suggestion that your Petitioners, as among those most conversant with the facts surrounding this patent litigation, should be thus excluded from any inquiry is decidedly fallacious. The term "fishing expedition" has been used in the decisions to characterize an inquiry for which the "fisher" has no substantial basis, and in the mere hope that something may

be discovered useful in the pending controversy or some other. The issue here is whether fraud or misconduct occurred in the rendering of the Root decrees on appeal. Those interested in a decision of this issue are this Court, the public at large, and those members of the public whose particular legal rights have been adversely affected and perhaps irreparably damaged if fraud occurred. There is here no divergency of interest; the interests of all are identical. That there is reasonable cause for the investigation, and a reasonable expectation that it will develop relevant facts, is hardly to be doubted.

At the top of page 2, (R. 61) the Answer says that *res adjudicata* will not be an issue "on any appeal from Judge Holly's decision." Presumably, this statement is made as a reason for lack of urgency in the proposed investigation. If so, it is immaterial and, in any event, the fact remains that Universal has not eliminated this issue, either in the *Globe* or in any other case, by formal amendment or waiver. Even if they should, it could not purge the corruption if it existed.

The significant fact presented by the Answer is the entire absence of any factual allegations in explanation of the peculiar circumstances surrounding the employment by Universal of Morgan S. Kaufman. The Answer states that he was retained in 1932 by the then general patent attorney of Universal, whose name is not given, but who H. J. Halle has stated to have been one Frank L. Belknap of Chicago who died in that year,* and so, unfortunately can never tell us what reason induced Kaufman's selection. Apparently no money was paid to Kaufman when he is

*This appears from Halle's testimony set forth in the Reply Memorandum of Arthur G. Logan.

said to have been retained, contrary to what is customary in the ordinary case of a retainer. The Answer says that he was hired to be available for service in the *Root* cases and all cases then pending or subsequently brought and to disenable him from representing antagonistic parties. What did Universal know about Kaufman that required that he be "disenabled" from retainer by others? The *Root* cases were pending in the District of Delaware in which Kaufman was never a resident. Why select Kaufman, out of thousands of famous and able Pennsylvania lawyers, as the one to be secretly "disenabled" from adverse retainer?

The averment of the Petition that Kaufman rendered *no* services in the *Root* cases is not squarely met, for the Answer merely states evasively that Kaufman's services were not "utilized to any substantial extent prior to the latter part of the year 1935." Nothing is said in the Answer as to what the inferred *insubstantial* services consisted of nor what they were worth. Could they have been worth twenty-five thousand dollars? It is not alleged that Kaufman ever consulted with any of the attorneys of record in the *Root* cases, nor that he read the record, nor that he collaborated in the Briefs.

The Answer admits that Kaufman was paid $25,000 in October, 1935, after the denial of Petitions for Certiorari, and says that this very substantial payment, after the lapse of three and a half years, was "as and for his said retainer in said *Root* case and pending matters for a period of approximately three and one-half years." There is no elucidation of what the other "pending matters" might have been. Clearly, they were not the Cities Service suits, for the Bill against the Cities Service subsidiary, namely, the

Crew-Levick Company, in the Eastern District of Pennsylvania, referred to in the Answer (R. 64), was not filed until January, 1936, as appears from the records of the District Court.

The inference is plain that there were no other matters for which Kaufman was retained and that his payment was entirely in connection with the *Root* cases, as will probably appear from the written records of Universal Oil Products Company, when they shall be produced.

The Answer states that Kaufman's payment was a retainer fee. We venture to suggest that this is the first instance in the Court's experience of a "retainer fee" being paid three and a half years after the alleged fact of retainer. Obviously, the payment was not a retainer, but was for services which the Answer refuses to explain or elucidate. A grave doubt is raised by the Answer as to the truth of Universal's allegation that Kaufman was retained at all in 1932, or at any time prior to 1935. If he was retained in 1932 to "disenable" him from adverse representation, why was he not then paid the customary retainer fee? It is most extraordinary that any lawyer would agree, without any advance payment whatsoever, to hold himself for three and a half years in readiness to perform future services.

The Answer states that the amount of the payment to Kaufman was submitted to Universal's two general counsel, both of whom are "eminent members of the New York Bar" and that "neither of them were attorneys of record" in the *Root* cases. Here, again, is an unusual circumstance. The names of these "eminent" lawyers are not given, nor is it explained why their approval of the amount was necessary, nor why the bill should not have been submitted to chief counsel of record in the *Root* cases. When their identity is

disclosed it will be interesting to learn how much information was given to them about Kaufman's employment and services.

There is no explanation in the Answer as to why Kaufman was *secretly* employed in the *Root* cases. His employment was of record in the *Crew-Levick* case, filed in January, 1936. It is also of record in the three cases referred to in the Appendix to Universal's Answer, namely, *Kelly-Springfield Tire Co.* v. *United States*, 81 F. (2d) 533, *Ballwood Co.* v. *Commissioner of Internal Revenue*, 84 F. (2d) 733, and *Hill* v. *United States, ex rel Weiner*, 84 F. (2d) 27. It is not alleged in the Answer that any one of the attorneys of record in the *Root* cases (except the deceased Mr. Belknap) even knew of Kaufman's supposed retainer therein. Lack of such knowledge was specifically alleged on information and belief in the Petition *Amicus Curiae* of Arthur G. Logan, and Universal's Answer thereto, by failing to deny the allegation, admits it.

The Answer denies the allegation of the Petition that Kaufman's "retainer" ended at about the time the *Root* cases were decided in the Court of Appeals, and states, (R. 63) that he was continued under such retainer until 1938. This is inconsistent with the next paragraph on the same page which states that Kaufman "was and has continued to be the attorney of record for Universal" in the *Crew-Levick* case. If, by these statements, it is meant that Kaufman's retainer in the *Root* cases continued until 1938, then it is inconsistent with Kaufman's own testimony in the trial of the indictment, reproduced in our Petition (R. 40) wherein Kaufman clearly said that his retainer was for three and a half years beginning in 1932, which would end it in 1935. From 1935 to 1938, the *Root* cases were pend-

ing on the accounting. Apparently, however, Kaufman did not render any services in this connection for none are mentioned in the Answer and Kaufman himself negatived any such idea.

The denial in the Answer (R. 64-5) of guilty knowledge by Universal is merely general, and is further weakened by the fact that H. J. Halle's verification of the Answer is on information and belief, even as to matters of fact. Nor, in any event, could Universal escape responsibility for fraud perpetrated by its agent and attorney. Under the present circumstances, a general denial of guilt is meaningless when unaccompanied by facts showing innocence.

At the top of page 6, (R. 65-6) the Answer refers to the fact that during 1935 Kaufman was attorney in three other cases in the Court of Appeals, in which cases Universal was not in any way related. The suggestion here seems to be that if Kaufman made the Stokley loan to improperly influence the Judge of the Circuit Court of Appeals in other cases besides that of *Universal* v. *Root*, this in some way dilutes the effect of the Stokley loan in the *Root* cases. We fail to see how the situation would be any different if Judge Davis were improperly influenced by Kaufman in all his cases pending on appeal in 1935, or only in the *Root* cases.

On page 6 of the Answer, (R. 66) Universal denies on information and belief that Kaufman had insufficient funds to make the Stokley loan without Universal's check for $25,000. In the trial of the indictment, we infer from questions put by the United States attorney that the government had in its possession proof that would have shown, had it been admitted, that Universal's information as stated in Paragraph 6 (b) is incorrect.

Beginning with Paragraph 6 (c) on page 6, and including the balance of that subparagraph, (R. 66-9) Universal's

Answer, besides referring to irrelevant matters, advances the theory that the suggestion of fraud in the *Root* cases is negatived by the fact that Universal subsequently pressed for trial on the Dubbs and Egloff patents in other circuits. We fail to follow the reasoning. Of course, Universal desired, and doubtless deemed it essential, to proceed against defendants who resided outside the Third Circuit and there is nothing in this fact which, in any way, bears upon the question of whether or not in the first case which it brought to trial, and in which it succeeded, there was a miscarriage of justice, thereby enabling Universal to go after defendants in other circuits with the enormous advantage of an adjudication in its favor.

In summation of the Answer, we suggest that it wholly fails to show any lucid or even understandable explanation of the matters alleged in the Petition. The circumstances surrounding the *Root* decrees still remain suspect in spite of the fact that in filing its Answer, Universal had the fullest opportunity to set forth in detail facts and circumstances, if any there were, which, if true, would completely explain any irregularity or imputation of fraud in connection with the retainer of Kaufman by Universal and the fact of the Stokley loan.

We respectfully submit that Universal's Answer supplies an additional, and most cogent, reason for the granting of the prayers of the Petition that a full investigation be made.

Respectfully submitted,

ARTHUR C. DENISON,
J. BERNHARD THIESS,
THORLEY VON HOLST,
As Amici Curiae.

EXHIBIT 8

Reply Memorandum of Arthur G. Logan as Amicus Curiae

To the Honorable Judges of the United States Circuit Court of Appeals:

1. The undersigned, Arthur G. Logan, heretofore filed a petition herein as Amicus Curiae and incorporated therein by reference and adopted the allegations, prayers and arguments of the Petition and Brief theretofore filed herein by Arthur C. Dennison, J. Bernhard Thiess and Thorley Von Holst. Universal Oil Products Company filed an answer to the Petition and Brief of said Arthur C. Dennison, J. Bernhard Thiess and Thorley Von Holst which will be referred to hereinafter as Universal's 1st Answer. Universal has also filed an answer herein to the petition of Arthur G. Logan as Amicus Curiae, which will be referred to hereinafter as Universal's 2nd Answer. Said Universal incorporated by reference in its said 2nd Answer the allegations contained in its said 1st Answer.

2. Since the filing of the petition herein by the undersigned, he took the testimony by deposition of Hiram J. Halle, President of Universal, in a case pending in the Superior Court of the State of Delaware, in and for New Castle County, entitled "Universal Oil Products Company vs. The Vickers Petroleum Company of Delaware." In said suit Universal is suing on a license agreement for royalties. The Vickers Petroleum Company of Delaware, hereinafter referred to as "Vickers," filed a plea asserting that it had not used any of Universal's patents after the expiration of the Dubbs '629 patent on October 4, 1938. Universal has

taken the position that Vickers is and has been since said date using certain other of Universal's patents, including the Egloff '593 patent. It is the position of Vickers that if the decision of this Court in the Root case, #5546, which holds that the Egloff '593 patent is valid, was obtained by corruption, then Universal should not be allowed to assert a claim for royalties based on the use thereof by Vickers, and furthermore, that if the decision of this Court in the Root case, #5548, which holds that the Dubbs '629 patent is valid, was obtained by corruption, Universal should not be allowed to assert a claim for royalties against Vickers for the use by Vickers of the Dubbs '629 patent prior to the date of its expiration. The said Hiram J. Halle testified when his deposition was taken as follows:

"Q. The Root case also established, or at least the court held in the Root case that these two patents were valid, is not that right?

A. The record will show. That is my understanding.

Q. Who were the attorneys of record for Universal in the Root case?

MR. GILPATRIC: You can state if you know.

A. I cannot tell you from memory. Judge Haight, Judge Hall of Washington, Mr. Thomas of Washington, Mr. Belknap, Mr. Wrightman.

Q. And Judge Morris, was he not?

A. And Judge Morris, yes.

Q. Mr. Halle, was Morgan S. Kaufman attorney for Universal in that case?

MR. GILPATRIC: Mr. Commissioner, I would like to have a five minute recess, if I may.

(Half hour's recess.)

(Question read by the reporter.)

Q. I will rephrase the question. Was Morgan S. Kaufman of Scranton, Pennsylvania, retained by Universal in the Root case?

MR. GILPATRIC: I object to the question on the ground that it has no relevancy to the issues in this case.

THE COMMISSIONER: I overrule the objection and direct the witness to answer.

Exception taken by Mr. Gilpatric.

A. He was one of the attorneys retained.

Q. He was not attorney of record, was he?

A. I think not; the record does not show his name.

Q. Was he paid a fee for acting in the case?

MR. GILPATRIC: The same objection.

THE COMMISSIONER: Same ruling.

A. Yes.

Q. How much?

MR. GILPATRIC: The same objection.

THE COMMISSIONER: Objection overruled.

Exception taken by Mr. Gilpatric.

A. $25,000 over the period of three to three and a half years.

Q. Will you give me the dates of the payments?

A. His services started in 1932 and he was paid in October, 1935.

Q. When was he paid?

A. In October, 1935.

Q. Was he paid the full $25,000?

A. The full $25,000. He had received nothing up to that time, and he had been retained in 1932 and served over that period.

Q. I understood a moment ago you said he had been paid from time to time. You mean the only payment was made in 1935?

A. I do not think I said anywhere that he was paid from time to time.

Q. I misunderstood you then.

A. I do not think your record shows that.

Q. The fact is that the full payment of $25,000 for his services in the Root case was made in October, 1935?

A. Yes, for his services from 1932 to the date of his payment.

MR. GILPATRIC: I think the record should show that that payment, so I am informed, was for services which included all the services in the Root case, and was not limited exclusively to services in the Root case.

MR. LOGAN:

Q. Mr. Halle, what other services did he render during that period other than services in the Root case?

A. In other litigation.

Q. What other litigation?

A. Well, I cannot specifically tell you, excepting I know he was in connection with the Cities Service Company Crew Levick case and others, but he was to be available for any services that we wanted.

Q. Now, Mr. Halle, by the Cities Service Crew Levick case you mean the suit filed against the Crew Levick?

A. Yes.

Q. There was no separate suit filed against Cities Service?

A. That is right.

Q. You mean the case Universal filed in Philadelphia against Crew Levick?

A. Yes.

Q. I call your attention to the fact that that case was filed in 1936.

A. Then I am mistaken as to that particular case. I did not meddle with the relationships and workings between the attorneys. He was retained and available for whatever litigation they wanted to consult him about.

Q. Who employed him?

A. Frank Belknap in 1932.

Q. What work did he do in the Root case?

A. I cannot tell you. I do not direct the work of the attorneys.

Q. Who paid him?

A. Universal.

Q. Did you personally O.K. the payment?

A. I did, yes, and approved by the attorneys.

Q. What attorney approved the payment?

MR. GILPATRIC: I object to this as beyond the widest scope of relevancy here, and direct the witness not to answer further.

THE COMMISSIONER: I overrule the objection and direct the witness to answer.

MR. LOGAN: Do you still refuse to answer?

MR. GILPATRIC: Yes, I direct the witness not to answer."

Due to the fact that the attorney for Universal, Mr. Gilpatric, directed Mr. Halle not to answer the question, "What attorney approved the payment?", the said Hiram J. Halle refused to answer the question and therefore the undersigned does not know what attorney approved the payment. In Universal's 1st Answer it stated that the payment was approved by two of Universal's general counsel, not attorneys of record. The undersigned is of the opinion that this Court should consider this attitude

of Universal in connection with the payment to Morgan S. Kaufman of $25,000.00. Why was Mr. Halle instructed not to give the name or names of the attorney or attorneys who approved the payment? Why didn't the counsel of record in the Root cases, for whose benefit Mr. Halle testified Morgan S. Kaufman was employed, (i.e., the employment was so that he should be available to them for consultation) approve the payment? They should have been the best qualified to judge the extent and value of the services. Was it because they didn't know that Kaufman had been employed? Probably so, because in the petition of the undersigned as Amicus Curiae he stated he believed that "None of said counsel of record knew of the employment of Morgan S. Kaufman by Universal Oil Products Company to act in the above-captioned causes." In its 2nd Answer Universal does not deny this averment. Rule 8(d) of the Rules of Civil Procedure provides that averments "are admitted when not denied in the responsive pleading." If that rule is applied, then we have a situation where Universal would have this Court believe that Morgan S. Kaufman was employed to be available as a consultant to the counsel of record in the Root cases and was paid therefor $25,000.00, even though the counsel of record, with whom he was to consult, never "knew of the employment." Furthermore, from the foregoing excerpts from the testimony of Halle it is obvious that the $25,000.00 was only paid for services in the Root cases. What services?

3. In paragraph 4 of the petition of Arthur G. Logan as Amicus Curiae there are set forth certain uses which Universal made of the judgment rendered by this Court in the Root cases. These uses are not denied. Nor does Universal deny that through the uses it made of the judgment

of this Court it was enabled to cause Eastern States to take a license agreement and agree to pay royalties and that it derived therefrom a substantial advantage in that in settlement Eastern States "surrendered a claim against an affiliate of Universal for a sum in excess of $2,000,000.00."

The undersigned therefore respectfully submits that Universal's 2nd Answer admits substantial reasons for the granting of the prayers of the petitions heretofore filed herein that a full investigation be made and prays that steps be taken, if corruption is discovered, to undo, if possible, the harm which has been caused through the use Universal has made of the judgment of this Court.

Respectfully submitted,

ARTHUR G. LOGAN,
As Amicus Curiae.

July 24, 1941.

EXHIBIT 9

Answer to Reply Memoranda of *Amici Curiae*

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

It seems unnecessary to make an extended answer to the reply memoranda of the respective petitioners. There are, however, four matters of fact in respect to which the petitioners presume to find something to bolster the inferences and insinuations of their original petition.

1. It is said that the names of the general counsel of Universal who approved the payment to Mr. Kaufman are not given in Universal's Answer. Exactly what significance this has is not apparent. However that may be, they are Mr. Richard E. Dwight, who at that time was senior member of the firm of Hughes, Schurman & Dwight, and Mr. William D. Whitney, a member of the firm of Cravath, deGersdorff, Swaine & Wood. Prior to the approval of the payment they were fully informed of Mr. Kaufman's employment as set forth in Paragraph V of Universal's Answer, and that he had performed no substantial services between the date he was retained and the time his fee was paid.

Alleged astonishment is expressed that Mr. Kaufman did not receive a fee at the time that he was retained, and also that his fee was approved by general counsel of Universal rather than by trial counsel. We venture the thought that the vast majority of lawyers, where they are retained by substantial concerns, receive no retainer at the time of their employment, and frequently no fee until a case is concluded or is in an advanced stage. The fees of attorneys

retained by Universal have never been approved by or even submitted to trial counsel of record herein during all the years of their employment.

2. From the fact that a statement of a "belief" in Mr. Logan's petition was not specifically denied in the Answer to that petition, petitioners infer that the retainer of Mr. Kaufman was unknown to trial counsel. The counsel of record who were charged with the trial of the *Root* cases were advised in 1932, prior to the trial of those cases, by Mr. Frank L. Belknap, then the general patent attorney of the Company, that Mr. Kaufman had been retained, as set forth in said Paragraph V of Universal's Answer.

3. In Mr. Logan's reply he quotes some testimony of Mr. Halle, President of Universal, which was taken by deposition on July 1, 1941, in an action at law which Universal has pending in the State Court of Delaware against The Vickers Petroleum Company, and because Mr. Gilpatric (of Cravath, deGersdorff, Swaine & Wood), who is representing Universal in that case, directed Mr. Halle not to give the name of the attorneys who had approved the payment to Mr. Kaufman, he asks why Mr. Halle was instructed not to answer. The reason is obvious. The question was utterly irrelevant to any issue in the *Vickers* case.

4. The reply memorandum of Messrs. Denison, *et al.* states (R. 79) that the answer contains "no elucidation" of the "pending matters" other than the *Root* cases in connection with which the payment to Mr. Kaufman was made, and then proceeds to aver that they could not have been the *Cities Service* suits. They know that there were at least two other important cases of Universal pending in the District of Delaware at the time the fee was paid to Mr. Kauf-

man. Indeed they were counsel for the defendant in one, *i. e.*, that against the Skelly Oil Company in a suit on the Dubbs patent.

In conclusion, although petitioners have filed their petitions as *amici curiae*, it is quite apparent that they have not acted in that capacity, even taking into account the permission granted by the Court to file their petitions as *amici curiae*. It is of course the usual function of an *amicus curiae* either voluntarily or on the invitation of the Court to instruct the Court on a matter of law concerning which the latter is doubtful, or of *facts*, a knowledge of which is necessary to a proper disposition of the case. It is not the function of an *amicus curiae* to take upon himself the *management* of the case.

It is apparent that petitioners have exceeded their proper function and, in the hope of gaining some advantage for clients whom they represent in other cases brought by Universal,* they have again presented in their reply memoranda only unjustified inferences, insinuations and assumptions as a basis for the prayers of their petitions. Accordingly, unless the Court desires an investigation for its own purposes, as pointed out in Paragraph VII-A of Universal's

*On July 24, 1941, Judge HOLLY rendered a decision in the *Globe* case holding the Dubbs patent valid but not infringed, the subsidiary Egloff patent invalid, and directing a decree dismissing the bill. The record in the *Globe* case was more voluminous and comprehensive than in the *Root* cases and included the *Behimer* prior inventorship defense and much more testimony on the point upon which Judge HOLLY's decision re non-infringement turned. Indeed in the letter which three of the *amici curiae* wrote to Judge HOLLY (referred to at the end of Paragraph II of the Answer herein) and in which they gave reasons for not accepting Universal's offer to have this Court reconsider the *Root* cases, they referred to the record in the *Root* cases as "insufficient".

Answer, they should not be accorded the aid of this Court to assist them in raising the defense of unclean hands in the other cases mentioned above, but should be remitted to the regular and appropriate proceedings in the trial court in which such cases are pending.

Respectfully submitted;

UNIVERSAL OIL PRODUCTS COMPANY

By H. J. HALLE
President.

RICHARD E. DWIGHT,*
THOMAS G. HAIGHT,
HUGH H. MORRIS,
WILLIAM F. HALL,
CHARLES M. THOMAS,
Of Counsel.

---

*It has not been possible to secure the signature of Mr. William D. Whitney as he is now in England engaged in war work where he has been since January of 1940.

EXHIBIT 10

Order

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

Nos. 5546 and 5648. October Term, 1940.

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

Before BIGGS, MARIS, CLARK, JONES and GOODRICH,
Circuit Judges.

ORDER

AND NOW, November 26, 1941, upon petition of Arthur C. Denison, J. Bernhard Thiess, Thorley Von Holst and Arthur G. Logan, as amici curiae, and after hearing and full consideration, IT IS ORDERED that Thomas Raeburn White, Esq., be and he hereby is appointed master, with authority to examine, investigate and to make and report to this court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman, and former Circuit Judge J. Warren Davis, and any and all persons acting for or on behalf of

any of them in connection with the above entitled causes and the entire subject matter of the prosecution and disposition of the said causes and in particular whether there was in connection therewith such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by this court in the above entitled causes on June 26, 1935.

IT IS FURTHER ORDERED that the said master be and he hereby is authorized and directed to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries, or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadelphia took place, to make available to him as an officer of this court a stenographic transcript of the said proceedings.

IT IS FURTHER ORDERED that the said master shall have power to issue subpoenas on the request of the parties interested in the above entitled causes, upon the request of the said amici curiae, or upon his own motion; that he shall have power to administer oaths and all the powers common to masters in the courts of the United States; that he shall rule upon and, for the time being, determine (subject to the final action of this court) all questions of evidence and of procedure which may arise before him; that he shall examine witnesses himself or permit them to be examined and

cross-examined by the parties interested in the said causes and by the said amici curiae within such reasonable limits as he in his discretion may impose; that he shall have power to issue subpoenas duces tecum; that he shall promptly report to this court for its action any matters which he may think proper for such report; that he may thus take evidence and proceed in any judicial district of the United States which he may think proper; and that he shall proceed to his final report with all convenient speed.

IT IS FURTHER ORDERED that the expenses of the said master and the compensation for his services, the amount of which shall be hereafter fixed by this court, shall be paid in the first instance by the said amici curiae and shall be ultimately taxed against the said amici curiae or the said Universal Oil Products Company as this court may direct. Pending his investigation and report the said master may require the said amici curiae to deposit with him a reasonable sum or sums as indemnity in respect of his expenses and compensation.

BY THE COURT:

JOHN BIGGS JR.
Circuit Judge.

RECEIVED & FILED
Nov 26, 1941
WILLIAM P. ROWLAND, Clerk.

EXHIBIT 11

Transcript of Hearing, December 11, 1941

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

October Term, 1940.

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

First meeting held before Thomas Raeburn White, Esq., Master, at 1930 Land Title Building, Philadelphia, Pa., on Thursday, December 11, 1941, at 10:00 o'clock A. M.

Present:

THOMAS RAEBURN WHITE, Esq., Master.

ARTHUR C. DENISON, Esq. (Union Commerce Bldg., Cleveland, Ohio),

J. BERNHARD THIESS, Esq. (77 West Washington Street, Chicago, Ill.),

THORLEY VON HOLST, Esq. (77 West Washington Street, Chicago, Ill.); and

ARTHUR G. LOGAN, Esq. (Continental American Bldg., Wilmington, Del.), amici curiae.

HUGH M. MORRIS, Esq. (3018 du Pont Building, Wilmington, Delaware); and

THOMAS G. HAIGHT, Esq., By Edward J. O'Mara, Esq. (15 Exchange Place, Jersey City, New Jersey), Representing the Universal Oil Products Company.

(A copy of the order appointing the Master follows:)

Before BIGGS, MARIS, CLARK, JONES and GOODRICH, Circuit Judges.

ORDER

AND NOW, November 26, 1941, upon petition of Arthur C. Denison, J. Bernhard Thiess, Thorley von Holst and Arthur G. Logan, as amici curiae, and after hearing and full consideration, IT IS ORDERED that Thomas Raeburn White, Esq., be and he hereby is appointed master, with authority to examine, investigate and to make and report to this court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman and former Circuit Judge J. Warren Davis, and any and all persons acting for or on behalf of any of them in connection with the above entitled causes and the entire subject matter of the prosecution and disposition of the said causes and in particular whether

there was in connection therewith such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by this court in the above entitled causes on June 26, 1935.

IT IS FURTHER ORDERED that the said master be and he hereby is authorized and directed to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries, or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadelphia took place, to make available to him as an officer of this court a stenographic transcript of the said proceedings.

IT IS FURTHER ORDERED that the said master shall have power to issue subpoenas on the request of the parties interested in the above entitled causes, upon the request of the said amici curiae, or upon his own motion; that he shall have power to administer oaths and all the powers common to masters in the courts of the United States; that he shall rule upon and, for the time being, determine (subject to the final action of this court) all questions of evidence and of procedure which may arise before him; that he shall examine witnesses himself or permit them to be examined and cross examined by the parties interested in the

said causes and by the said amici curiae within such reasonable limits as he in his discretion may impose; that he shall have power to issue subpoena duces tecum; that he shall promptly report to this court for its action any matters which he may think proper for such report; that he may thus take evidence and proceed in any judicial district of the United States which he may think proper; and that he shall proceed to his final report with all convenient speed.

IT IS FURTHER ORDERED that the expenses of the said master and the compensation for his services, the amount of which shall be hereafter fixed by this court, shall be paid in the first instance by the said amici curiae and shall be ultimately taxed against the said amici curiae or the said Universal Oil Products Company as this court may direct. Pending his investigation and report the said master may require the said amici curiae to deposit with him a reasonable sum or sums as indemnity in respect of his expenses and compensation.

BY THE COURT:

JOHN BIGGS, JR.
Circuit Judge.

RECEIVED & FILED
Nov 26, 1941
William P. Rowland, Clerk.

The Master: Judge Denison being requested by the Master to indicate the procedure which he had in mind, suggested that the Master should procure the papers which the order indicates should be made available to him, and that they should be open to the inspection of all counsel as amici curiae before the next step is taken.

Have you gentlemen anything to say about that?

Mr. O'Mara: Nothing excepting that it seems to me if they are made available for the inspection of amici curiae they should also be made available for the inspection of counsel for the Universal Oil Products Company.

Mr. von Holst: To which we agree.

Mr. Thiess: No objection on our part.

(Discussion off the record.)

The Master: It is suggested by Mr. von Holst that the papers to be obtained would consist of the records of the grand jury proceedings in New York and Philadelphia, the reports of the F. B. I. investigation, and the statements of witnesses taken by the office of the Attorney General in Washington.

Mr. von Holst: Mr. Gahagan is the one that probably has all these papers, and the request, I would suggest, would be properly made upon him in the first instance, because he might have all the papers in one place.

The Master: What is his full name?

Mr. von Holst: Walter H. Gahagan.

The Master: Was he in charge of this matter?

Mr. von Holst: He was in charge of the indictment trials in Philadelphia.

The Master: Did he try the case?

Mr. von Holst: He tried the case for the Government.

(Adjourned to a date to be announced in the future.)

EXHIBIT 12

Transcript of Hearing, April 16, 1942

October Term, 1940.

Second meeting held before Thomas Raeburn White, Esq., Master, at 1930 Land Title Building, Philadelphia, Pa., on Thursday, April 16, 1942, at 11:00 o'clock A. M.

Present:

THOMAS RAEBURN WHITE, Esq., Master.

J. BERNHARD THIESS, Esq. (77 West Washington Street, Chicago, Ill.),

THORLEY VON HOLST, Esq. (77 West Washington Street, Chicago, Ill.), and

SIDNEY NEUMAN, Esq., (77 West Washington Street, Chicago, Ill.),

amici curiae.

HUGH M. MORRIS, Esq. (3018 du Pont Building, Wilmington, Delaware),

EDWARD J. O'MARA, Esq. (15 Exchange Place, Jersey City, New Jersey),

RALPH S. HARRIS, Esq. (100 Broadway, New York City, N. Y.), and

FREDERICK W. P. LORENZEN, Esq. (100 Broadway, New York City, N. Y.),

Representing the Universal Oil Products Company.

The Master: Pursuant to the arrangement made at the last meeting in this matter, I spent several days in New York going over records and testimony in the office of

Walter H. Gahagan, Assistant United States Attorney in the Southern District of New York. I examined a great mass of pages and many exhibits.

As a result of my first interview with Mr. Gahagan, I produced certain exhibits and other documents for the examination of counsel on January 19, 1942, as shown in the Memorandum which was furnished to the counsel at the time, and which is as follows:

"IN RE ROOT REFINING COMPANY *v.* UNIVERSAL OIL PRODUCTS COMPANY

MEMORANDUM FOR COUNSEL IN REFERENCE TO PAPERS LOANED TO T. R. WHITE BY WALTER H. GAHAGAN, ASSISTANT U. S. ATTORNEY, AND WHICH ARE NOW SUBMITTED TO COUNSEL FOR THEIR EXAMINATION

Mr. Gahagan advises me that in his notes which he used in cross-examining Mr. Kaufman in the trial in the District Court is contained a transcript of all of the testimony given by Mr. Kaufman before the Grand Jury relating to the Universal Oil transactions. He further advises me that the statements taken by the F. B. I. would be of no value as all information which proved to be material is disclosed in the other documents submitted. He considers that most of the F. B. I. reports are of little or no value and they are apparently very voluminous.

Mr. Gahagan assured me, however, that if in going over the aforesaid documents counsel conclude that other papers in his possession might be relevant, arrangements can be made to procure such

other papers. My own opinion is, after going over them quite fully with Mr. Gahagan, and afterwards, that we have everything he has which would really throw any light on the questions at issue.

T. R. White

January 19, 1942.

LIST OF PAPERS LOANED TO MR. WHITE BY MR. GAHAGAN IN NEW YORK ON THURSDAY, JANUARY 15, 1942.

Notes of Mr. Gahagan for use in cross-examining Mr. Kaufman re Universal Oil and Stokley transactions.

Folder containing grand jury testimony of Charles L. Stokley.

Grand jury testimony of W. M. Behrens (pages 56 to 94).

Folder containing grand jury testimony of Hiram J. Halle.

Statement of Judge Thomas G. Haight consisting of 7¼ pages.

The Public National Bank and Trust Company statement of Morgan S. Kaufman, first entry dated Oct. 31, '35, and last entry Nov. 30.

The Public National Bank and Trust Company statement of Morgan S. Kaufman, first entry dated Sept. 30, '35, and last entry Oct. 31.

Certified photostatic copy of the docket entries in the case of Root Refining Co., v. Universal Oil Products Co., (No. 5546), to June 1, 1941, being page 208.

Certified photostatic copy of the docket entries in the case of Root Refining Co., v. Universal Oil Products Co. (No. 5648), to June 1, 1941, being page 60.

Original copy of letter dated July 27, 1936, from Universal Oil Products Company to Mr. Morgan S. Kaufman.

Photostatic copy of Voucher No. 12005, dated 12/2/36, Universal Oil Products Co., to Morgan S. Kaufman, in the amount of $10,000.00.

Photostatic copy of Voucher No. 10095, dated Oct. 18, 1935, Universal Oil Products Co., to Morgan S. Kaufman in the amount of $25,000.00.

Photostatic copy of Voucher No. 3120, dated 3/18/36, Universal Oil Products Co., to Morgan S. Kaufman, in the amount of $10,000.00.

Handwritten memo as follows: "Mr. Healy Mr. Morgan S. Kaufman, 9 East 46th St., New York City." (Photostatic copy)

Photostatic copy of memo dated Dec. 2, 1936, Mr. L. M. Healy, B. G. Lenske.

Photostatic copy of letter dated December 2, 1936, from Universal Oil Products Co., to Mr. Morgan S. Kaufman.

Photostatic copy of letter dated March 18, 1936, from Universal Oil Products Co., to Mr. Morgan S. Kaufman.

Photostatic copy of memo dated Mar. 17, 1936, Mr. W. M. Behrens, B. G. Lenske.

Photostatic copy of letter dated December 2, 1936, from Universal Oil Products Co., to Mr. Morgan S. Kaufman.

Photostatic copy of memo dated Dec. 2, 1936, Mr. L. M. Healy, B. G. Lenske.

Photostatic copy of letter dated March 18, 1936, from Universal Oil Products Co., to Mr. Morgan S. Kaufman.

Photostatic copy of Voucher No. 7203, dated 7/27/36, Universal Oil Products Co., to Morgan S. Kaufman, in the amount of $5,000.00.

Photostatic copy of letter dated July 27, 1936, from Universal Oil Products Co., to Mr. Morgan S. Kaufman.

Photostatic copy of handwritten memo as follows: dated 3/18/36: "Morgan S. Kaufman $10,000. Mr. Healy telephoned me and said Mr. Halle ordered this check for $10,000.00 to be mailed to Mr. Kaufman, 9 East 46th St., New York, tonight.

B. G. L."

Photostatic copy of memo dated July 27, 1936, Mr. W. M. Behrens, B. G. Lenske.

Photostatic copy of memo dated Dec. 2, 1936, to Accounting Department requesting voucher in favor of Mr. Morgan S. Kaufman, in the sum of $10,000.00. Photostatic copy of statement dated 1/2/36 as follows: "In full for services for the year 1936 and for retainer for 1937 as per telephone conversation Healy-New York at request of H. J. H. $10,000.00."

Photostatic copy of letter dated July 29, 1936, from Morgan S. Kaufman to Universal Oil Products Co.

Photostatic copy of memo dated 3/18/36, to Accounting Department requesting voucher in favor of Morgan S. Kaufman in the sum of $10,000.00.

Photostatic copy of statement dated 3/18/36, as follows: "Retainer 1936 for services rendered and to be rendered in connection with our pending Litigation per phone conversation between L. M. Healy & B. G. Lenske 3/18/36 $10,000.00."

Photostatic copy of inter office correspondence dated July 23, 1936, to B. G. Lenske from W. M. Behrens.

Photostatic copy of inter office correspondence dated December 4, 1936, to Mr. B. G. Lenske from L. M. Healy.

Photostatic copy of memo dated July 27, 1936, to Accounting Department requesting voucher in favor of Morgan S. Kaufman in the sum of $5,000.00.

Photostatic copy of statement dated 7/27/36, as follows: "To be applied against services rendered in connection with General Legal Services per W. M. Behrens memo to B. G. Lenske dated July 23, 1936 $5,000.00".

Photostatic copy of handwritten memo stamped received Dec. 2, 1936, Accounting Department, as follows: "Healy—Check $10,000.00 Morgan S. Kaufman in full for serv. 1936 & ret. for 1937."

Photostatic copy of memo dated Oct. 18, 1935, to Accounting Department requesting voucher in favor of Morgan S. Kaufman in the sum of $25,000.00

Photostatic copy of statement dated 10/18/35, as follows: "Legal services to date in connection with the Root Case and pending matters per authority of Mr. Mitchell $25,000.00."

Photostatic copy of check No. 4317, dated October 18, 1935, to the order of Morgan S. Kaufman, $25,000.00, by Universal Oil Products Co.

Photostatic copy of check No. 4425, dated March 18, 1936, to the order of Morgan S. Kaufman, $10,000.00, by Universal Oil Products Co.

Photostatic copy of check No. 4597, dated December 2, 1936, to the order of Morgan S. Kaufman, $10,000.00, by Universal Oil Products Co.

Photostatic copy of check No. 4495, dated July 27, 1936, to the order of Morgan S. Kaufman, $5,000.00, by Universal Oil Products Co.

Photostatic copy of handwritten memo as follows: "N. Y. Oct. 22/35. Rec'd of Universal Oil Products Co., the sum of $25,000.00 in full for services to Oct. 1, 35. Morgan S. Kaufman."

Photostatic copy of letter dated July 8, 1935, from T. H. C., to Mr. C. L. Stokley.

Photostatic copy of letter dated July 23, 1935, from T. H. C., to Hon. J. Warren Davis, consisting of 3 pages.

Photostatic copy of letter dated July 26, 1935, from J. Warren Davis to Thomas H. Cooley, Esq., consisting of two pages.

Photostatic copy of letter dated July 29, 1935, from T. H. C., to Mr. C. L. Stokley.

Photostatic copy of letter dated July 29, 1935, from T. H. C., to Hon. J. Warren Davis.

Photostatic copy of letter dated August 9, 1935, from J. Warren Davis to Thomas H. Cooley, Esq.

Photostatic copy of letter dated September 25, 1935, from T. H. C., to Judge J. Warren Davis.

Photostatic copy of telegram dated Oct. 3, 1935, from Thomas H. Cooley to Judge J. Warren Davis.

Photostatic copy of telegram dated Oct. 4, 1935, from J. Warren Davis to Thomas H. Cooley.

Photostatic copy of telegram dated Oct. 24, 1935, from Thomas H. Cooley to Judge J. Warren Davis.

Photostatic copy of telegram dated Nov. 6, 1935, from Thomas H. Cooley to Judge J. Warren Davis.

Photostatic copy of telegram dated Nov. 6, 1935, from J. Warren Davis to Thomas H. Cooley.

Photostatic copy of letter dated November 29, 1935, from T. H. C., to Mr. Charles L. Stokley.

Photostatic copy of agreement between Morgan S. Kaufman and Charles L. Stokley and Delta Stokley, dated the 25th day of November 1935, consisting of four pages.

Photostatic copy of letter dated March 10, 1936, from J. Warren Davis to Mr. Charles L. Stokley, consisting of two pages.

Two separate photostats being two pages of one letter in handwriting, apparently undated, from J. Warren Davis, to "Dear Charlie".

Photostatic copy of check No. 207, dated November 14, 1935, to the order of, apparently, B. F. Ford Atty (being somewhat illegible), $10,000.00, signed by Morgan S. Kaufman. (One photostat of the front of the check, and one of the back, both being attached to one sheet of white paper.)

Photostatic copy of check No. 109, dated May 15, 1939, to the order of Morgan S. Kaufman, $600.00, signed by C. L. Stokley. (One photostat of the front of the check, and one of the back, both being attached to one sheet of white paper.)

The Master: Subsequently, pursuant to a request from counsel that certain further records should be examined and other material obtained, if possible, I paid a second visit to New York and secured the various documents and material mentioned in the second memorandum which was submitted to counsel on March 19, 1942, and which is as follows:

"Root Refining Company v. Universal Oil Products Co.

MEMORANDUM BY THE MASTER

Pursuant to the request of counsel, I examined the available material in the office of the Assistant United States Attorney in New York which might throw any light upon the issues raised in the present investigation.

Among other things, I examined and secured the report of F. B. I. Investigator C. B. Winsted on his interview with Stokley, dated February 15, 1940, and also a later report relating generally to the same subject, dated March 5, 1940. These two reports are submitted for examination of counsel.

I also secured photostatic copies of certain records from the First National Bank of Miami, Florida, which bear generally on the same subject and which are herewith submitted.

I also secured a copy of voluminous statements made by Wilmer C. Stokley and his father, Charles Lee Stokley, taken in question and answer form in the United States Attorney's office in New York at various dates on and after February 29, 1940, which are submitted for the examination of counsel.

I also examined many other reports and statements to ascertain if anything was contained in any of them which might throw any additional light upon the questions now under investigation. In this connection, I examined statement of J. Warren Davis taken before the United States Attorney on July 3, 1940. In this statement there is no reference whatever to the Stokley loan or the oil cases, or to Kaufman's connection with them. The examination related largely to Davis' bank account and the $5,000 bills which figured in the prosecution.

I have also examined Judge Davis' statement taken before the same persons on September 9, 1940. This statement contains no reference of any kind either to the Stokley loan or to the oil cases.

There are only two references in the statement which might possibly have some bearing on the instant investigation. In the course of Judge Davis' investigation, a letter was shown him from Root, Clark, Buckner & Ballantine, dated July 3, 1940, in which it was said were enclosed several sheets being a summary of cash deposited and withdrawn from safe deposit boxes by Judge and Mrs. Davis during the period from January 1, 1932, to January 1, 1940. Judge Davis said the memorandum was substantially correct, and was cross-examined at some length concerning his financial transactions. A copy

of that memorandum no doubt could be secured from Root, Clark, Buckner & Ballantine if thought material.

Many of the transactions about which Judge Davis was asked related to the period prior to 1935. The safe deposit box in which Judge and Mrs. Davis kept money appears to have been in the vaults of the Philadelphia Saving Fund Society.

There is also a statement by Marguerite G. Davis (Judge Davis' wife) taken September 9, 1940, referring to the same matters, and more particularly to a loan which was made in 1936 to one David Lewis. So far as appears, this has no connection with the oil cases or with Mr. Kaufman. The loan in question appears to have been made from money in the safe deposit box in March of 1936, and was in the amount of $4300 or $4400. Mrs. Davis said the money had been repaid.

Mrs. Davis also corroborated the correctness of the memorandum above referred to of cash deposited and withdrawn from the safe deposit box. This examination related mainly to the $1000 bills which figured in the trial of Judge Davis.

A memorandum which accompanied the above statements apparently made as a result of the investigation indicates that Judge and Mrs. Davis were insolvent from 1929 on, that they were continually borrowing money from friends and banks, and at the same time Judge Davis was making loans to others, particularly David Lewis.

Their indebtedness to banks which amounted to $157,000 was said to have been adjusted by cash payments of $37,000 made by one Samuel Ungerleider, who was apparently a stock broker. It was stated in the memorandum that the money to make this settlement was loaned by Ungerleider, his explanation being that he did it out of friendship for Judge Davis.

This compromise settlement was made in May of 1937. There was also the surrender of collateral amounting to $57,000, so that the loss to the banks was approximately $61,000, according to the memorandum.

This memorandum states that the F. B. I. had attempted to reconcile the cash available to Judge Davis from all sources with the cash actually expended by him. The memorandum said that approximately $17,000 of cash was expended in excess of the cash available to Judge Davis so far as known, and that no explanation had been made. This reconciliation apparently related to the period 1936 to 1939, inclusive.

The memorandum also contains a section relating to the Stokley transaction. It describes the loan as shown in the papers which we have, and states that:

> "Judge Davis had continuously interested himself in attempting to settle Stokley's obligation with the municipality which held the lien upon Stokley's property."

There is nothing new in the memorandum, except perhaps a statement that in 1936, within six months from the time the loan was made to Stokley by Kaufman, Judge Davis made a loan to Stokley by borrowing $4,000 from Ungerleider. This loan is said to have been repaid.

A search was made for the statements mentioned in counsel's letter to me of February 17, 1942, of J. Warren Davis and Morgan S. Kaufman to the F. B. I. investigators. No such statements could be found, but as Judge Davis and Mr. Kaufman were fully examined before the Grand Jury in New York, it is doubtful whether such statements would contain anything new.

I read through in its entirety the testimony before the New York Grand Jury of Judge Davis and Mr. Kaufman, have made extracts of all matters which seem to me to be material to the present investigation, and these are now submitted for the examination of counsel.

No questions were asked Judge Davis about the Universal Oil case in this examination. In explanation of this, Mr. Gahagan said that the investigation they were then making related primarily to other matters and that as Kaufman's appearance had never been entered in the oil case, they preferred not to ask Judge Davis anything about it.

I also procured and submit herewith a summary report by the F. B. I. which may be of some interest.

T. R. White,
Master

March 19, 1942."

The Master: Counsel on both sides, as I understand it, have examined all this material to the extent which they care to do so at this time.

I may add that I have now procured a copy of the record of the Grand Jury sitting in Philadelphia which investigated the affairs of Judge Davis and Mr. Kaufman, but I have not yet had an opportunity to examine it. I have agreed with Judge Biggs that I would examine this record, and if I found anything in it material to the present inquiry it should be used in this proceeding. If I find nothing which seems to me to have a bearing on the issues presented in this investigation, I will return the record to the proper parties.

That brings us up to date, gentlemen.

Mr. Harris: May I suggest an amendment to your statement wherein you said you made a second investigation at the request of counsel? It should appear that was at the request of counsel for the so-called amici curiae.

The Master: All right, put it that way, counsel for the amici curiae.

(Discussion off the record.)

The Master: Mr. Von Holst, for counsel designated as amici curiae, presented a request for the issuance of subpoenas, which is as follows:

"IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 5546 and 5648. October Term, 1940

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

MEMORANDUM OF AMICI CURIAE, SUGGESTING CERTAIN WITNESSES TO BE CALLED AND CERTAIN SUBPOENAS TO BE ISSUED

To The Honorable Thomas Raeburn White, Special Master:

The undersigned, as *amici curiae*, respectfully suggest that subpoenas duces tecum be issued by the

Master, pursuant to the authority vested in him by the order of the Court of Appeals of November 26, 1941, commanding certain witnesses hereinafter named to appear before the Master in the order named, and on such dates and at such places as the Master may designate, and to testify in these proceedings, said subpoenas to incorporate the provisions, as to the production of documents, hereinafter set forth under the respective names of said witnesses:

I

Universal Oil Products Company, a South Dakota Corporation, and Universal Oil Products Company, a Delaware Corporation, both of whose offices are located at Rockefeller Center, New York City, N. Y., and Hiram J. Halle, President, and W. M. Behrens, Secretary, of said corporations:

1. All memoranda, reports, correspondence, telegrams, diaries, writings and printings, of every nature, of whatsoever date—or copies thereof if the originals are not in your possession, and whether official or personal, referring or pertaining in any way to the employment by Universal Oil Products Company or by its officers, attorneys, agents, or employes, of Morgan S. Kaufman and/or David Kaufman, as attorneys or agents or in any other capacity whatsoever.

2. All memoranda, reports, correspondence, telegrams, diaries, writings and printings of every nature of whatsoever date, and whether official or personal,—or copies thereof if the originals are not in your possession—with, concerning, referring or pertaining in any way to Morgan S. Kaufman and/or David Kaufman, whether by name or otherwise.

3. All contracts, agreements, documents, and all supplements thereof, writings and printings of every nature of whatsoever date—or copies thereof if the originals are not in your possession—made and entered into by and between Universal Oil Products Company, and Morgan S. Kaufman and/or David Kaufman, relative to employment, services, compensation or bonuses of or for the said Morgan S. Kaufman, the said David Kaufman, or both of them, or any appointee of both or either of them.

4. All records, data, books of account, ledgers, journals, books of entry, cancelled checks or vouchers,—or copies thereof if the originals are not in your possession—showing payments to or for the account of Morgan S. Kaufman, and/or David Kaufman, or any appointee of both or either of them, either as fees, gifts, bonuses, cancellations of indebtedness, or obligations, or present or future compensation of any nature made by Universal Oil Products Company, or any officer, agent, employe, or attorney thereof, at any time.

5. All memoranda, reports, correspondence, telegrams, diaries, writings and printings, of every nature, of whatsoever date, and whether official or personal,—or copies thereof if the originals are not in your possession—written or exchanged by and between Universal Oil Products Company or any officer, agent, employe, or attorney thereof on the one hand and Morgan S. Kaufman and/or David Kaufman or any associate or employe of Morgan S. Kaufman and/or David Kaufman on the other hand, pertaining to or referring in any way to:

(a) The cases entitled *Universal Oil Products Company* v. *Root Refining Company*, Equity Nos. 715 and 895, heretofore pending in the United States District Court for the District

of Delaware, and in the United States Circuit Court of Appeals for the Third Circuit, Appeals Nos. 5546 and 5648.

(b) The case entitled *Universal Oil Products Company* v. *Crew-Levick Refining Company*, heretofore and now pending in the United States District Court of the Eastern District of Pennsylvania, Equity No. 9287.

(c) Any retainer of Morgan S. Kaufman and/or David Kaufman or of any associate or employe of the said Morgan S. Kaufman and/or David Kaufman for the State of Pennsylvania, or with respect to any other case or matter involving the Universal Oil Products Company.

II

Lee J. Gary—attorney for Universal Oil Products Company, whose address is First National Bank Building, Chicago, Illinois:

1. All memoranda, reports, correspondence, telegrams, diaries, docket sheets, books of account, journals, books of entry, writings and printings of every nature of whatsoever date, and whether official or personal,—or copies thereof if the originals are not in your possession—from the files, books, diaries or records of Frank L. Belknap or from your files, books, diaries, or records:

(a) Referring or pertaining in any way to the employment by Universal Oil Products Company, or by Frank L. Belknap, or by any other agent or attorney, of Morgan S. Kaufman and/or David Kaufman, as an attorney or agent, or in any other capacity whatsoever.

(b) Showing or tending to show the itineraries, conferences, and sojourns away from

Chicago, Illinois, of the said Frank L. Belknap, during the years 1932 and 1933.

2. All memoranda, reports, correspondence, telegrams, diaries, docket sheets, books of account, journals, books of entry, writings and printings of every nature of whatsoever date, and whether official or personal,—or copies thereof if the originals are not in your possession—from the books, records, diaries, and files of Frank L. Belknap, or from your books, files, diaries and records, with, concerning, referring or pertaining in any way to Morgan S. Kaufman and/or David Kaufman.

3. All correspondence, telegrams, memoranda, documents, writings, and printings of every nature, of whatsoever date, and whether official or personal, —or copies thereof if the originals are not in your possesesion—written or exchanged by and between Frank L. Belknap or yourself or any associate or employe of Frank L. Belknap or yourself on the one hand and Morgan S. Kaufman and/or David Kaufman, or any associate or employe of the said Morgan S. Kaufman and/or David Kaufman on the other hand, pertaining to or referring in any way to services, legal or otherwise, for or on behalf of Universal Oil Products Company, its agents or attorneys.

III

E. Ennalls Berl, attorney for Universal Oil Products Company, whose address is Delaware Trust Building, Wilmington, Delaware:

1. All records, books of account, ledgers, Journals, diaries and books of entry showing payments to or for your account made by Universal Oil Products Company in connection with the following cases:

(a) The cases entitled *Universal Oil Products Company* v. *Root Refining Company*, Equity Nos. 716 and 895, heretofore pending in the United States District Court for the District of Delaware, and in the United States Court of Appeals for the Third Circuit, Nos. 5546 and 5648.

(b) The case entitled *Universal Oil Products Company* v. *Empire Refining Company*, Equity No. 1162, heretofore and now pending in the United States District Court for the District of Delaware.

IV

Wm. F. Hall, Charles M. Thomas, and Hugh M. Morris, attorneys for Universal Oil Products Company, whose addresses are, respectively, Victor Building, Washington, D. C.; Shoreham Building, Washington, D. C., and Dupont Building, Wilmington, Delaware:

1. All memoranda, reports, correspondence, telegrams, diaries, writings, and printings, of every nature, of whatsoever date, and whether official or personal,—or copies thereof if the originals are not in your possession:

(a) Referring or pertaining in any way to the employment by Universal Oil Products Company or by its officers, attorneys, agents, or employees, of Morgan S. Kaufman and/or David Kaufman, as attorneys or agents or in any other capacity whatsoever.

(b) With, concerning, referring or pertaining in any way to Morgan S. Kaufman and/or David Kaufman, whether by name or otherwise, or to payments for or on the account of both or either of them.

V

Richard E. Dwight, attorney for Universal Oil Products Company, whose address is 100 Broadway, New York, N. Y.:

1. All memoranda, reports, correspondence, telegrams, diaries, writings and printings, of every nature, or whatsoever date, and whether official or personal,—or copies thereof if the originals are not in your possession:

(a) Referring or pertaining in any way to the employment by Universal Oil Products Company, or by its officers, attorneys, agents, or employees, of Morgan S. Kaufman and/or David Kaufman, as attorneys or agents or in any other capacity whatsoever.

(b) Relating to the payment of compensation to Morgan S. Kaufman, as an attorney, employed by Universal Oil Products Company, or to the approval of said payment.

It is further respectfully submitted that the testimony of those named in the foregoing list and the documents which may be produced will not furnish all the evidence which should be adduced in these proceedings. The present suggestion of certain witnesses to be called will be followed at later stages of the proceedings with further suggestions, should the Master desire them, as to other evidence and the manner of adducing it.

/s/ ARTHUR C. DENISON
/s/ J. BERNHARD THIESS
/s/ THORLEY VON HOLST
Amici Curiae."

The Master: Have you gentlemen anything to say about that?

Mr. Harris: I do, your Honor, and may I ask that my remarks be put on the record?

The Master: Yes, very well.

Mr. Harris: We construe the order of the Circuit Court of Appeals referring the matter to you, which order was dated November 26, 1942, as having for its primary purpose an investigation by the Court looking toward the vindication of the honor of the Court, or otherwise, as the case might be. Otherwise, as it seems to us, Your Honor is not a Master in a litigation but an investigator for the purpose of advising the Court of his conclusions and findings.

We welcome such an investigation. We will cooperate to the extent of our abilities, and wish to have the investigation as wide as possible.

To the extent that the amici curiae are really litigants, or to the extent that any finding by His Honor or by the Circuit Court of Appeals might affect property or other rights of Universal Oil Products Company, or in any wise affect the merits of the two Root cases, although we entertain in our own minds no doubt as to the propriety of everything which has transpired and that will be duly shown, nevertheless, we feel we should be somewhat derelict in our duties to our client if we did not make upon the record an objection to the jurisdiction of the Circuit Court of Appeals, and, consequently, of Your Honor, to hear and determine in a summary and informal manner, and in a proceeding which doesn't amount to a controversy or suit prescribed by the Constitution of the United States, matters which affect or might affect property rights of our client and a judgment in its favor in the Court in this circuit.

I should say in explanation of my remarks that if we are right on the question of jurisdiction, then, as we understand the law, it is not necessary to make an objection at this time, an objection to the jurisdiction of the subject matter may be taken at any time even on appeal, but I thought in fairness both to the Master and to counsel who are present for the amici curiae that I should attempt on behalf of our client to distinguish between what I regard as the function of the order of the Circuit Court of Appeals and what it might conceivably be attempted to be used for by counsel for the amici curiae who I understand are counsel for interested parties in other litigation, and therefore, purely for the sake of advising Your Honor and counsel, formally object in so far as this proceeding is other than an investigation by the Court looking toward vindication of the Court's honor, or otherwise; object that the Court is without jurisdiction to take testimony or to take any action, and that the order under which these hearings are held is likewise without jurisdiction, and without going into the details I urge that the investigation and order are not made in a case or controversy, as that case is defined in Sections 1 and 2, Article 3, of the Constitution of the United States.

That there are not now before the Court or the Special Master any adverse parties so that any case or controversy can be said to exist.

That there is not now before the Special Master any justiciable controversy over which the Circuit Court of Appeals or the Special Master has jurisdiction.

That the persons designated in the order of the Circuit Court of Appeals herein as friends of the Court are not adverse parties technically, and have no standing as adverse parties in the cases of Root Refining Company, Defendant-

Appellant against Universal Oil Products Company, Plaintiff-Appellee, Nos. 5546 and 5648.

That the order of the Circuit Court of Appeals herein and hearings before the Special Master are beyond the jurisdiction of the Circuit Court of Appeals because the cases above referred to were disposed of by the Circuit Court of Appeals at a term other than the term at which the order herein was made, and, finally, that the Circuit Court of Appeals at the time when the order herein was made had no jurisdiction whatever in the cases above referred to, because the term in which said Court had decided said cases and handed down its mandate had previously come to an end, and these objections I make without limiting the generality of my general objection.

Your Honor having stated it is for the information of the Master and counsel, I again said that in so far as this proceeding is an investigation by the Court of its membership and the propriety of acts taken by its membership even with relation to any of our clients, we welcome the opportunity for that matter to be heard and determined by Your Honor in any manner which you see fit.

Now that our objections may be said to have substance, I should point out that under the order, I take it Your Honor may make your own investigation, may consider proceedings before the Grand Jury both in New York and here, and may make such further and other investigation as to Your Honor seems proper. I think that is entirely proper in such a proceeding, to inquire into the honor of those previously sitting on this Court.

However, if it were to involve any property rights of our clients, including the validity of any judgment, then, of course, none of this evidence would be admissible in a

plenary action. We would have a right to require it to be sworn to and delivered in open court with an opportunity for cross-examination, and all the rights which litigants are guaranteed in a controversy or case under the Constitution of the United States.

Directing myself to the suggestion for a subpoena duces tecum, it is our view that Your Honor has plenary power to make such investigation as you see fit, and to inquire of such sources as you see fit, and in that we will cooperate with you to the extent of our ability.

To the extent that subpoena duces tecum or other subpoenas are to be issued upon the suggestion of counsel for either side here, it seems apparent to me from a reading of the order that the same latitude is not afforded, that those should be considered and determined just as if a subpoena duces tecum was being requested in the ordinary controversy, and should be, accordingly, determined by rules of law.

I particularly find myself somewhat surprised that counsel have requested Your Honor to issue a subpoena duces tecum directed to any of the counsel who have appeared in this controversy because both in the oral argument before the Circuit Court of Appeals and in their petition, as I recall it—certainly, in their briefs—counsel for the amici curiae have disclaimed any intent to involve any lawyer who appeared in the case. All of these lawyers appeared in the case.

So far as Your Honor is interested in talking to Mr. Hall, or Mr. Thomas, or Judge Morris, or anyone else in the case, if Your Honor wants to see them in your office, or see them in their offices and ask them to throw their books open to you for investigation, we welcome that, but so far

as producing them for the inquisitorial gaze of counsel for the friends of the Court is concerned, it seems to us that a proper case for the issuance of a subpoena duces tecum should be made before one is issued.

I don't know what the practice in this court is. In any event—and that is by the way, but I assume that the subpoena duces tecum must be issued out of the court, itself, rather than by the Master. Perhaps the practice is different in this circuit. In any event, we don't want to be technical, but we do think that while a form an investigation by Your Honor between parties who are not adversary to each other in the technical sense actually becomes a litigation without giving us the rights and remedies of a litigant before the Court, we should request that the usual requirements be adhered to, and that counsel should make a proper case for the issuance of a subpoena.

I know that in the Second Circuit the presentation of such a suggestion as this—at least, it is my belief—would not in any such sweeping and summary fashion as this result in the issuance of a subpoena duces tecum of this type, it seems to me that counsel must show more in so far as their becoming litigants rather than assisting the Master in making an investigation for the Court. They must show far more than they would just like to browse around among some lawyers' and some other people's papers.

Again I urge Your Honor that we not put ourselves in your mind for one moment in the position of being obstructive. We will throw everything open to your own investigation and consideration. We do feel that these gentlemen who are adversaries of our company and attacking its property rights in other jurisdictions should not acquire an advantage which is not permitted by law in this investiga-

tion which, as we see, is directed toward a consideration of whether the Court as previously constituted did wrong in the moral sense, and whether any of our clients or their representatives or agents were involved therein.

The Master: Do you wish to reply?

Mr. Von Holst: I think that so far as the jurisdiction of the Court is concerned—the jurisdiction of the Court of Appeals and of Your Honor as Master thereof—there is nothing that needs to be said at this time by the amici for the reason that the order speaks for itself, and these proceedings are held pursuant to that order, and the Master's powers are defined therein.

Now, I am a little at a loss to understand the objection which has been made to the suggestion of the issuance of subpoenas. Certainly, there is nothing in this memorandum which we have submitted to Your Honor which constitutes an attempt to browse around among papers of lawyers.

These paragraphs are all certain in their subject matter. They are all directed to the employment or payment of Morgan S. Kaufman or David Kaufman, and they don't go beyond that. The order gives the Master:

> ". . . power to issue subpoenas on the request of said amici curiae or upon his own motion . . ."

The suggestion contained in the document submitted this morning needs no other ground by way of petition to support its apparent and self-evident relevancy and materiality to the investigation. No one could question that if any of these documents or records, memoranda, diaries, telegrams, and so forth, are in existence that they would have a material bearing upon the investigation, anything

which tends to throw light upon the manner in which Kaufman was retained, how much was paid him, and so forth.

So far as the procedure which the Master is going to follow in this investigation is concerned, the presence or the absence of the amici, that, of course, is entirely for the Master to decide. We have nothing to say on that.

We understand our position here under the order of the Court appointing us amici curiae to be that of assisting in any way that it is within our power to assist. We will be governed entirely by the Master's requests and suggestions along that line.

In so far as the fact that we are interested in other proceedings is concerned, that is to say, in other cases wherein Universal is plaintiff and we appear as counsel of record for the defendant, that has no bearing upon our status as amici in these proceedings for the reason that it was fully known to the Court of Appeals at the time the application was made, and, in any event, is generally the case where amici are appointed. They generally have some collateral interest.

The same argument was made before the Court of Appeals at the June 4th hearing last summer, and subsequently in the answer to the formal petition which the Court of Appeals desired be filed, and which was filed. Mr. Thiess calls my attention to the fact that Mr. Harris has mentioned the fact that we have disavowed any suggestion that any reproach is directed to counsel of record for Universal in the Root cases. We, of course, reaffirm that disclaimer, but we fail to see that there is anything in the suggested memorandum for the issuance of subpoenas which in any way in the slightest conveys any implication or suggestion of reflection upon certain counsel.

The Master: Have you anything further to add, Mr. Harris?

Mr. Harris: Your Honor, I have only this, that I don't think that Mr. Von Holst quite understood my remarks. I was not trying to put him in a position where a Judge in litigation I heard of once said to a litigant who wasn't formally in the case, "Either appear or disappear."

I recognize their status here, but I would feel that in so far as they became litigants or attempted to become litigants rather than merely sitting in an investigation of the Court, and in this relatively informal manner attempt to gain an advantage which they could not have if they were litigating, for instance, if they set up the defense of unclean hands in these litigations that are now pending against them, it might constitute a defense to the actions if proved, and they would have to prove them in a certain way.

To the extent Your Honor permits them, over our objection, to be litigants in this matter; it seems to me they should have no greater advantage than they would have in such a plenary action. That is my whole point.

The Master: The objection so far as it goes to the jurisdiction of the Court of Appeals and myself as Master appointed by the Court of Appeals, I assume has already been passed upon by the Court.

So far as the objection relates to the requests made by counsel for the amici curiae, as I read this order it was expected that I would make use of them or of counsel for the other side in any investigation which I was directed to make, and, consequently, that either side might suggest persons to be subpoenaed, or documents to be subpoenaed, and that it was my duty to proceed in that manner.

So far as regards the relevancy of the matters covered, I take it that will be passed upon when the witnesses come before me. If any testimony is offered or any documents are presented which do not appear to me to be relevant to the investigation, of course, I would rule that they be excluded. I therefore overrule the objection.

Mr. Harris: Just as a matter of clarification, Your Honor, may I inquire whether you are overruling my objection that the application for a subjoena duces tecum at the instance of counsel for the amici should be in the regular and usual form for such applications in court? Because Your Honor understands if we see Your Honor is interested in anything these people have, or anyone else has, we will freely lay it open to your inspection either here or wherever you desire, and if you find, just as you did in the case of the records of the Grand Jury, anything which you think is relevant to your investigation, then, of course, that should be brought forward.

But it would seem to us that when counsel began to try a defense, an alleged defense to the Root case in this investigation of the Circuit Court of Appeals for the Third Circuit, we were justified in asking that they proceed in the same manner as if they were trying to sustain such a defense of an action.

Mr. Von Holst: May I speak to that, Your Honor?

The Master: Yes.

Mr. Von Holst: It seems to me there is nothing that has been suggested thus far in the proceedings of the Court of Appeals or in the proceedings before Your Honor that remotely suggests any issue of defense such as might have been interposed or could still be interposed in the Root case, and, therefore, I don't see the ground of the objection to

the issuance of subpoenas. This is directed entirely to a matter in issue which is before Your Honor on this investigation.

Mr. Harris: There is no issue, Your Honor, in this matter, so far as I see.

Mr. Von Holst: Perhaps I should further clarify the situation—we have already done so before although Mr. Harris wasn't here—in this respect, that we do not represent the Root Refining Company, that is, by "we" I mean the amici, in any situation which they might have, the Root Company having settled its case and not being represented in these proceedings either before the Court of Appeals or here, and we do not represent them.

The Master: So far as regards the power to issue subpoenas duces tecum, you will recall the Court specifically said in its order that I shall have power to issue subpoenas duces tecum and that this should be done at the request of a party. It would seem to me the order is perfectly clear on the point, so far as the direction that I have received from the Court is concerned, which, of course, I am bound by.

Mr. Harris: Your Honor, we very gracefully bow to your interpretation of the order.

The Master: Is there anything further to be discussed at this meeting?

Mr. Von Holst: I would think the time of the next hearing, if the Master entertains favorably the suggestion for the issuance of subpoenas.

We would like to add as amici that order we have drawn there is not a formal subjoena, and if Your Honor so requires, we will be pleased to draw up the subpoenas in the regular form incorporating those provisions.

The Master: Yes, I would like you to do that. I think I am directed to issue subjoenas whenever requested by

counsel, and if you will prepare them I will issue them, and you will see to it that they are served, will you?

Mr. Von Holst: Yes, sir.

Mr. Harris: Your Honor, by my remarks in saying that we submitted to Your Honor's interpretation of the order, of course Your Honor will understand that we don't waive our interpretation——

The Master: Oh, yes. I understand. Now, about the time for the next meeting, may I ask, you have covered here a number of witnesses, I see, and these are probably not the entire list of witnesses you intend to call.

Mr. Thiess: No, it is not the entire list.

Mr. Von Holst: That is explained in the last paragraph, if Your Honor pleases.

(Discussion off the record.)

Mr. Von Holst: In the examination of witnesses by amici curiae we feel that the privilege should be extended of adverse examination as though under cross- examination, that the amici should not be called upon in a matter of this kind to vouch for the credibility of witnesses whom they call, and to be bound by their replies. If it were otherwise, the situation would not tend to become clarified, but rather to become obscured.

Mr. Harris: May I be heard on that, Your Honor?

The Master: Yes.

Mr. Harris: Your Honor, it seems to me that counsel are immediately recognizing the difficulties of their position, which is to enjoy all the privileges of a litigant with none of its responsibilities, and while they call themselves amici curiae, and while they are technically in that position in that they are not technically litigants, we all know very

well that their interest in this case—and they won't deny it —is to win a point.

Your Honor, of course, is not only in the position of a Judge but you are also constituted an investigator, and so you may make such independent investigation of such witnesses as you desire without in any wise being bound by their testimony, of course.

But for counsel to come in and claim all of the advantages of a litigant when they are not, other than technically, friends of the Court, and not assume any of the responsibilities of it, seems to me unfair.

Now, if they can persuade you to call these witnesses perhaps they will be in a different position, but there again we want Your Honor to call everybody you are interested in, but I don't think we ought to be put at the disadvantage of litigating with someone who doesn't have to bear the responsibilities of a litigant.

Mr. Von Holst: On that point, Your Honor, it seems to me that there should be a clarification once and for all of our status here.

We have just been accused of having one only interest, namely, to win a point, and have been declared as technically friends of the Court.

Now, the point was made before the Court of Appeals that we were no fit persons to appear as friends of the Court because of the fact that we have battled Universal in the Root case and were adversaries to them in pending litigation. In spite of that objection, the Court of Appeals appointed us.

Now, if we misbehave ourselves Your Honor has power to control us, but we do object to aspersions on our standing which at present have no basis whatsoever.

On this question of adverse examination, if the Master, himself, called the witnesses in a proceeding of this kind, obviously the Master would not be bound by their replies any more than when a witness is called as a witness of the Court. In whatever way it be done, if Your Honor desires the amici to examine witnesses, that should be the basis upon which the examination should be conducted, that the witness be a witness called by the Court, and then that both sides may cross-examine if necessary. That is the Point I submit.

Mr. Harris: Your Honor, may I in response to that and purely in the interest of clarifying the position say this, those matters were before the Circuit Court of Appeals, and the Circuit Court of Appeals were very careful explicitly to set forth the rights and duties of all parties, and it provides that the:

> ". . . the Master shall have the power to issue subpoenas on the request . . . of the said amici curiae . . ."

Then after authorizing Your Honor to administer oaths and pass on questions of evidence and procedure, it authorizes Your Honor to:

> ". . . examine witnesses himself or permit them to be examined and cross-examined by the parties interested in the said causes. . ."

Now, I can't find any clearer language——

The Master: And by the amici.

Mr. Harris: Oh, yes, I beg your pardon.

> ". . . and by the said amici curiae within such reasonable limits as he in his discretion may impose. . ."

Now, I can't imagine any clearer language to indicate that whoever calls the witness shall examine and that the other persons before the Court shall cross-examine.

I don't cast any aspersions upon my very learned and esteemed friends. I certainly don't want to let myself get in the position on the outset of what I hope will be the beginning of an interesting and instructive reference at odds with counsel. I shall hold my temper and I don't mean anything except that these gentlemen don't claim—I don't see how they can claim—that they appeared before the Circuit Court purely in a disinterested fashion, Chicago lawyers coming to Philadelphia for the purpose of helping the C. C. A. investigate its own bench.

Now, we must be realists. We all live in a real world, and while these gentlemen are called amici curiae, the Court couldn't call them anything else. We don't say that they are going to be unfair, but they are obviously here in the business of clients, and just not to recognize that fact would not be to recognize the reality of the situation, and I mean nothing else. I have the highest esteem for all of them, and I won't be angry no matter what they say about me.

The Master: Well, I think as realists we must recognize, of course, that you gentlemen on either side have private interests that you are serving as well as the public interest.

On the other hand, the primary interest of the Court, I think, was public interest to make sure that its decision in this case had been, as it said, not tainted with fraud.

I do not think that the investigation—for that is all it is—should be conducted strictly according to the rules of evidence in litigation. I certainly do not feel that either party should be bound by the statements of witnesses that

they call, as very often, certainly, they will be adverse witnesses in a sense.

As regards the examination, itself, whether it should be cross-examination or not, I think we can control that as we come to it. I don't think that is a very serious thing one way or the other. But I do think that as being an investigation, no one should be considered bound on either side if a witness makes an unexpected reply, which sometimes does happen.

Now, is the only thing before us the date of the next hearing?

Mr. Von Holst: There is one other matter, if the Master please, and that is we should like to make a request for the production of, I think it is two, and possibly three, further Stokley letters addressed to Cooley.

Mr. Neuman: They were referred to in the Government trial but they were not produced, and so we don't know the contents, but we do have them by exhibit numbers.

The Master: At what trial were they produced?

Mr. Neuman: At the second trial.

The Master: In Philadelphia?

Mr. Neuman: Yes.

Mr. Thiess: As it stands, the correspondence is incomplete.

Mr. Neuman: They are in the possession of the Government.

The Master: The letters you speak of are in the possession of the United States Attorney, presumably, which were not copied into the record, is that right?

Mr. Thiess: Correct.

The Master: If you will specify what they are, I will make inquiries about them.

Mr. Von Holst: Maybe we could just drop you a note with that information.

The Master: All right. As I said before, I have this Grand Jury record, and I will look through it as soon as I can, and if I find anything in there that I think will be of interest to either of you, I will call it to your attention.

Mr. Thiess: May I ask, as far as going through this additional record, is it of such a size that it is going to take some time to go through it, or would you be able to go through it in the near future so that if there is anything of interest there we may see that before we get started?

The Master: I think I can read it very rapidly.

Mr. Thiess: Then we can probably see it before we get started?

The Master: Yes.

Mr. Harris: Your Honor, I see that we are to produce certain records or will be required to, when Your Honor signs this subpoena, of the Universal Oil Products Company, the South Dakota and Delaware companies, the president and secretary, two witnesses and all of those documents, Mr. Gary and his documents, that is three; Mr. Berl and his documents, that is four; Mr. Hall and Mr. Thomas and Judge Morris, and their documents; that is seven, and Mr. Dwight, eight. There are eight witnesses, every one of whom is a busy lawyer, and——

The Master: They are all lawyers, are they?

Mr. Harris: They are all lawyers with the exception of Mr. Halle and Mr. Behrens, secretary of the company.

Mr. Thiess: Behrens, I believe, is a lawyer, but not in the practice of law.

Mr. Harris: Then those are all busy practicing lawyers. Mr. Halle is an aged man today 75 years old, I understand,

and Mr. Behrens is a young active man. The others are busy men of various ages and states of health.

Mr. Hall has not been as well as he might be. He is one of the active patent lawyers in the matter. Do I assume that counsel propose to take these gentlemen up—you don't want them here on the same day sitting around?

Mr. Thiess: No.

Mr. Harris: We will have to fix up a schedule for their appearance. We will have to give them certainly, I think, several weeks notice to arrange their time, particularly if Your Honor would like to hold these hearings on several consecutive days and attempt to get through with them.

The Master: I would like to because several months have gone by already, and we haven't really gotten started yet, and the Court of Appeals did enjoin me in its order to proceed with all convenient speed, I think was the language.

Mr. Harris: Your Honor, of course, my colleague on whom I must rely most heavily, Senator O'Mara, at the present time tells me he is pretty well tied up in the Legislature of New Jersey which is attempting to get through with its business for the current year, and, Senator O'Mara, suppose you tell His Honor what your engagements are.

Mr. O'Mara: Well, we are driving for a final adjournment of the Legislature which we hope to accomplish for the first of May. That means we will be in session probably all of the remainder of April, starting on next Monday, without any substantial interruptions.

The week of the 5th of May, by which time I expect that we shall have adjourned, however, is the opening of our State Supreme Court for the May term in which I have three cases scheduled for argument.

As far as my personal engagements are concerned, I would recommend a continuance of the hearing until the week of May 12th, and I think in view of the probable engagements of Mr. Thomas, possibly Mr. Hall also, that at least several weeks notice should be given to them in order that we can guarantee their appearance at the time that Your Honor fixes.

The Master: I think that I could accommodate my own time.

(Discussion off the record.)

Mr. Harris: Your Honor, could we advise you, and either through you, or directly counsel within the next few days whether we can conveniently assemble those men for the week of the 12th? You tell me about how long you will take with each man.

Mr. Thiess: The difficulty is that it is going to be very hard to do that.

(Discussion off the record.)

Mr. Thiess: The question I ask is this, as far as these papers that we wish to put in is concerned, and suggest to Your Honor that we might want to offer, those will be sufficient for proof of the matters as contained in those papers, and we would not have to call the witness to prove that particular thing.

The Master: You are referring now to the papers that have been examined?

Mr. Thiess: That have been examined.

The Master: And have been admitted in the Grand Jury proceedings in New York, or elsewhere?

Mr. Thiess: Or the other papers that you have procured for us.

Mr. Harris: My understanding is that so far as the investigation by the Master of the propriety of the Court's action is concerned, but not waiving any of our client's rights with regard to the merits, any property rights or judgments in its favor; we, of course, frankly will freely concede that the documents which the Master has in his possession are true and accurate documents covering what they purport to cover. If we find any errors in the documents, we will call them to your attention or produce the other documents for your examination.

The Master: Very well.

Mr. Harris: There is one thing, those F. B. I. reports I think stand in a little different category. These are narrative statements by men who have not even sworn to them, and whose position it is to try to put people in jail; I mean that is their career, and I think the contents of those have all been addressed to the witnesses, one or the other of them, and questions asked about them, and so I feel that while it is all right to stipulate the accuracy of the testimony on those matters, these unsworn statements of F. B. I. agents stand in a little different category.

The Master: I think you would accede to that.

Mr. Von Holst: I think that is probably true, Your Honor. There might be subject matter of the F. B. I. reports we may prove by calling the F. B. I. men, but I would agree that a statement not sworn to by an F. B. I. investigator would not be original evidence.

The Master: No, it would be hearsay. Then you want to fix May 12th, I understand?

Mr. Thiess: That will be Tuesday.

The Master: Do you actually want these subpoenas issued?

Mr. Harris: No, I don't think so. So far as we are concerned, if you will tell us you will sign the subpoena in this form, we will regard it as a subpoena unless some of our witnesses want to see your signature. In that case I will advise you very promptly.

(Discussion off the record.)

Mr. Harris: May we let Your Honor know, and counsel, how these men's time will line up just as promptly as we can get hold of them, which will be in a few days?

Mr. Thiess: And, of course, we will do everything to suit their convenience.

Mr. Harris: We will use our own judgment a little bit on how to space them, because there is no use having all seven here all morning, and we may have some more on Tuesday, and some more on Wednesday. Does Your Honor want to go right on that week every day?

The Master: As long as you can do it, I would like to conclude as far as possible with those witnesses. I see the 11th is Monday. You said the 12th.

Mr. Thiess: The 11th is all right.

Mr. O'Mara: I made the statement. The 11th is Monday.

Mr. Harris: Judge Morris tells me, he thinks with the possible exception of anything whch Mr. Halle or Mr. Behrens might have there isn't a thing that anybody has that would be responsive in the way of documents to the subpoena. If that is so, I think we might bring a few more of them down here. Do you propose to examine them on the matter before the Master generally rather than merely with respect to documents?

Mr. Thiess: We might have just a few questions we would like to ask them.

Mr. Harris: If we find that to be the case, we may produce them a little bit more rapidly.

Mr. Morris: It seems to me that there isn't a person, Hall, or Thomas, or any of these others that has a chance in a million of having any documents about this, and I think they will all tell you that the first they knew of it was when told by Mr. Belknap that the thing had been done, and you will be able to turn us out at the rate of five a minute.

The Master: Does the hour of eleven suit you?

(Discussion off the record.)

Mr. Von Holst: I suggest we make it eleven the first day, Monday.

One other point: Do we understand now that the earlier suggestion that the Master gave to us that we draw subpoenas for the Master's signature is not required?

Mr. Harris: That is right.

Mr. Morris: We will assume that they have been issued in conformity, reserving the objections made by Mr. Harris.

(Adjourned to Monday, May 11, 1942, at 11:00 o'clock A. M.)

EXHIBIT 13

Memorandum Made by Master Upon Examining Certain Documents, etc.

The following documents were filed as part of the Record by the Master although not offered in evidence by Amici Curiae or Universal Oil Products Company.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648.
October Term, 1940.

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee

MEMORANDUM MADE BY MASTER UPON EXAMINING CERTAIN DOCUMENTS IN THE OFFICE OF THE UNITED STATES ATTORNEY IN NEW YORK AND CONTAINING EXTRACTS FROM THE TESTIMONY OF MORGAN S. KAUFMAN AND J. WARREN DAVIS BEFORE THE GRAND JURY

I examined statement of J. Warren Davis taken before the United States Attorney on July 3, 1940. In this state-

ment there is no reference whatever to the Stokley loan or the oil cases, or to Kaufman's connection with them. The Examination related largely to Davis' bank account and the $5,000 bills which figured in the prosecution.

I have also examined Judge Davis' statement taken before the same persons on September 9, 1940. This statement contains no reference of any kind either to the Stokley loan or to the oil cases.

There are only two references in the statement which might possibly have some bearing on the instant investigation. In the course of Judge Davis' investigation, a letter was shown him from Root, Clark, Buckner & Ballantine, dated July 3, 1940, in which it was said were enclosed several sheets being a summary of cash deposited and withdrawn from safe deposit boxes by Judge and Mrs. Davis during the period from January 1, 1932, to January 1, 1940. Judge Davis said the memorandum was substantially correct, and was cross-examined at some length concerning his financial transactions. A copy of that memorandum no doubt could be secured from Root, Clark, Buckner & Ballantine if thought material.

Many of the transactions about which Judge Davis was asked related to the period prior to 1935. The safe deposit box in which Judge and Mrs. Davis kept money appears to have been in the vaults of the Philadelphia Savings Fund Society.

There is also a statement by Marguerite G. Davis (Judge Davis' wife) taken September 9, 1940, referring to the same matters, and more particularly to a loan which was made in 1936 to one David Lewis. So far as appears, this has no connection with the oil cases or with Mr. Kaufman. The loan in question appears to have been made from money in the safe deposit box in March of 1936, and was

in the amount of $4300 or $4400. Mrs. Davis said the money had been repaid.

Mrs. Davis also corroborated the correctness of the memorandum above referred to as cash deposited and withdrawn from the safe deposit box. This examination related mainly to the $1000 bills which figured in the trial of Judge Davis.

A memorandum which accompanied the above statements apparently made as a result of the investigation indicates that Judge and Mrs. Davis were insolvent from 1929 on, that they were continually borrowing money from friends and banks, and at the same time Judge Davis was making loans to others, particularly David Lewis.

Their indebtedness to banks which amounted to $157,000 was said to have been adjusted by cash payments of $37,000 made by one Samuel Ungerleider, who was apparently a stock broker. It was stated in the memorandum that the money to make this settlement was loaned by Ungerleider, his explanation being that he did it out of friendship for Judge Davis.

This compromise settlement was made in May of 1937. There was also the surrender of collateral amounting to $57,000, so that the loss to the banks was approximately $61,000, according to the memorandum.

This memorandum states that the F. B. I. had attempted to reconcile the cash available to Judge Davis from all sources with the cash actually expended by him. The memorandum said that approximately $17,000 of cash was expended in excess of the cash available to Judge Davis so far as known, and that no explanation had been made. This reconciliation apparently related to the period 1936 to 1939, inclusive.

The memorandum also contains a section relating to the Stokley transaction. It describes the loan as shown in the papers which we have, and states that:

> "Judge Davis had continuously interested himself in attempting to settle Stokley's obligation with the municipality which held the lien upon Stokley's property."

There is nothing new in the memoranudm except perhaps a statement that in 1936, within six months from the time the loan was made to Stokley by Kaufman, Davis made a loan to Stokley by borrowing $4,000 from Ungerleider. This loan is said to have been repaid.

Extracts from the Testimony of Morgan S. Kaufman in the Case of U. S. v. John Doe, Before the Grand Jury in New York on February 20, 1940.

Kaufman was asked to give a list of the cases on which he had acted as counsel from 1930 to date. He made out a list and testified further as follows, page 577:

> "A. I think I have submitted a case here where I was not really attorney of record, and that is the Universal Oil Products Company vs. Root Refining Company. I was not attorney of record in that case except I was retained in the case."

The witness was not asked further about this case at that time. At page 580 the witness was asked:

> "Q. Is it your practice to keep a bill book? A. No.
>
> Q. Do you keep records of the amount of work you have done on a particular matter? A. Very seldom."

The witness said he had not kept a diary except for about a year before the examination. He also said he kept no record of the work he had done on any particular case.

The witness denied that he had any records in Pennsylvania, although he said he still had "office room" in Pennsylvania.

The witness was recalled on March 5, 1940, and states on page 600 that he knew Judge Davis quite well, that he was "a close friend." He denied that he ever had any business transactions with him. The following questions and answers appear:

"Q. Did you ever have a financial transaction with Judge Davis? A. Not that I can recall.

Q. Did you ever lend Judge Davis any money? A. Not that I can recall.

Q. You did have a financial transaction in which Judge Davis was interested in, didn't you? And that is what I call the Stokley transaction. A. I don't see how he was interested.

Q. Tell me about this, you know what I refer to when I state the Stokley transaction? A. Yes.

Q. Did—would you start right at the beginning and tell me all that you know about that transaction? A. I met Judge Davis either on the train or somewheres and he asked me whether I wanted to make an investment, whether I had some loose money I wanted to invest. I said yes, Judge, what have you got in mind?

He said I have a relative that owns some property down in Florida, and there are liens against this property to the extent of $30,000. He may have said $29,000 or $30,000. And he can settle the tax liens for $10,000.

He went on to tell me about it. I said well, Judge——

Q. Wait a minute, I don't want to skip anything. What did he go on to tell you about him? A. I can't recall, that was five years ago. I said, Judge—he said I don't know the details about this property.

I said who is this man?

He said he is a relative of mine, whether he said a cousin or whatever it was. He said do you know the rate of interest in Florida is 8%, the legal rate of interest.

I said that is very interesting, I will look into that whenever you have the details.

He said I expect him here some time this fall and when he gets here I am going to give you a ring, I want you to meet him. That was about all that was said at the first meeting.

Q. You say you met Judge Davis on the train? A. I think it was on a train.

Q. About when was this? A. I think it was early in the summer of the year I loaned the money to him.

Q. Could it have been any earlier than the summer? A. It may have been.

Q. Will you continue with your story? A. I had forgotten all about it months had gone by, and some time in October of that year I get a call from Judge Davis, he said Mr. Stokley, the man he had spoken to me about that wanted the loan, was there and he would like to have me come up. This was while I was in New York. Whether I went up that day or the next day, I am not sure, but I finally went up, and when I went in I shook hands with Judge Davis and he introduced me to Mr. Stokley.

Q. Had you ever seen Mr. Stokley before? A. Never met him before. After a few preliminaries about conditions in Florida and the weather there, he said you gentlemen have some business to discuss.

This is the gentleman I was telling you about. All I can say to you, Mr. Kaufman, is any statement Mr. Stokley makes, you can rely upon. He says you gentlemen go work in the library; and we walked in there and we found Mr. Lord there, who is the U. S. Attorney of New Jersey, or first assistant.

Q. What was he then? A. He was the law clerk of the Judge. I had met him before, I had learned he was a very able man, and as he was leaving I said don't leave, Mr. Lord, there may be something I would like to confer with you on.

So he stood there and Mr. Stokley told us exactly what he had to offer, the property he had consisting of so many lots and so many buildings, and there was a lien, a municipal lien.

So, I think he said $30,000, and that he could settle that for about $14,000; that he could raise $4,000 himself if he could get someone to advance him $10,000 he could settle with the borough for that sum of money—for that amount of money, and the borough would give him, the person who loaned him the $10,000, the deed.

He then said my wife and I own some property that is free and clear of all liens and encumbrances, the house we live in, and there was a block and some sort, orange grove. This was worth a great deal of money. He said we will put that up as further collateral security. We would like to have this loan for five years. All I want is an agreement from you that I have the right to repurchase it within a period of five years for the $10,000 plus interest, and I think he said we will make payments on the principal of $2500 a year.

After talking it over a while, I said, what about the search of this property, what about the title?

He said my lawyer will search the title.

I said that is not quite satisfactory to me. Are you willing to pay the expenses of Mr. Lord to go down and search the title?

He said I am.

I said Mr. Lord, would you be willing to go down there?

He said I would be very glad to go to Florida.

We decided the thing to do was to draw an agreement. He had all the papers there, and we drew an agreement. This agreement provided just as I have related to you, that he was to transfer all this property to me together with all the property he and his wife owned in fee simple free and clear of all liens and encumbrances as further collateral security, and that he was to pay it back within five years plus 8% interest.

While we were dictating this agreement, it was getting late, and I said Mr. Lord, understand this thoroughly, work up this agreement and send it to me in New York, and if this agreement is satisfactory, just in accordance with what he said here, I will sign the agreement and send a check, certified check for $10,000 made out to B. F. Lord, attorney. You go down to Florida. If the title is just as Mr. Stokley says it is, and if the Borough of Mt. Dora is willing to transfer this property to me for $10,000, and you make a search of the property and see that everything is O. K. you go ahead and deliver this check.

I got the agreement——

Q. Who sent it to you? A. Mr. Lord, and I signed the agreement, and I made a check payable to B. F. Lord, attorney. I had the check certified, mailed it to Mr. Lord, and later on Mr. Lord sent me back the deed from the Borough of Mt. Dora for this property that they have sold for the taxes for $10,000, and a quit claim deed from the husband and wife, a warranty deed from the husband and wife

to me of the other property which he was to give me as collateral security. He sent me back a guaranteed search of the title to the extent of $10,000 from the Florida Title & Trust Company, and also sent me a fire insurance policy on his own home to the amount of $4,000. I think that is exactly what took place there. I have the check here if you would like to look at it.

Q. Yes, I would.

(Witness produces check.)

A. I also have with me—the check, by the way, is endorsed Pay to the order of the Town of Mt. Dora B. F. Lord, attorney, and I think to the credit of the Borough of Mt. Dora, I am not sure.

Q. Have you your subpoena? A. I don't think I have it with me. I also have with me the deed from the Borough of Mt. Dora to Morgan S. Kaufman, dated the same date, the 25th of November, signed by the Town of Mt. Dora by the Mayor of the town for the sum of $10,000.

I also have with me a quit claim deed for the same property that the Borough of Mt. Dora gave me the title to from husband, and wife of Mr. Stokley, all marked B. F. Lord, endorsed.

I also have with me a warranty deed from Mr. Stokley and his wife for his own home and some tenement houses and two tenement block store buildings which were given to me as collateral.

I have the title policy of insurance issued by the Title & Trust Company of Florida, Jacksonville, Florida, guaranteeing the title to the extent of $10,000, and I also have the fire insurance policy on the home for $4,000, and together with this agreement which was made at the time. I would be very glad to have you look at any one of these.

Q. Did you ever prepare a statement, I mean in the legal sense, describing this Stokley transaction? A. I did.

Q. How did you happen to prepare that? A. Senator George Wharton Pepper of Philadelphia called me on the telephone and said would you mind preparing a statement for me? I want to take it down to the Department of Justice. There is some question going on about a loan that you made to a man by the name of Stokley. This is in reference to an investigation going on in reference to Judge Davis.

I said I will be very glad to prepare the statement, which I did prepare, and later he told me he talked to the Department of Justice.

(Statement marked G. J. Exhibit 43, and copy marked G. J. Exhibit 44.)

Q. I show you Grand Jury Exhibit for identification 43, and ask you if this is the statement you prepared for Senator Pepper? A. It is.

Q. Are the facts as stated therein true and correct? A. Absolutely, that I can recall, I think they are substantially what I said to day, and they are true.

Mr. Willauer: I offer it in evidence.

The Witness: It may not be the exact words, but it is substantially true.

Q. This is a true story? A. No question about it.

Q. You mean there might be a typographical error? A. No, I mean I might not use the exact verb or the exact word, but otherwise the statement is absolutely correct.

Q. I show you Grand Jury Exhibit 44 for identification. Will you tell me whether or not that is a

carbon copy of the statement. A. It looks like it.

Q. This $10,000 check which you have produced is a check on your account? A. A check on the Public National Bank & Trust Company?

Q. It is a check on your account? A. Yes, sir.

Q. I wish to read from your subpoena. It calls for all cancelled checks and check stubs for bank accounts in your name individually or as trustee for the period from January 1, 1935, to date. This is such a check, is it not? A. Yes, you have it—my stub, the check book.

Q. That check then was called for by the subpoena? A. Yes. These were all put together and have all been together in the vault for several years.

Q. Are there any other checks which you have not produced for us? A. Unless the young lady didn't give it to me; I gave her the subpoena and said give me everything you have got here.

Q. I would like to read you the last paragraph of this statement, that is, the last paragraph. There is one sentence in addition. Perhaps you will read it to the jury.

(Mr. Kaufman reads from statement.)

Q. Have you any occasion to discuss this matter with Mr. Lord? A. I have never talked to Mr. Lord about this matter, that day until this.

Q. How do you know the facts can be verified by Mr. Lord? A. He has got to tell the truth.

Q. You have not communicated with Mr. Lord with reference to the facts since you had the meeting with Lord and Stokley? A. What do you mean by communicating?

Q. You understand that word, don't you? A. Do you mean by word of mouth?

Q. I mean in any way. A. Yes. I think at the time I was ready to take that statement to Senator

Pepper I mailed Mr. Lord a copy of this agreement or this statement.

Q. Did you write him a letter when you mailed it? A. I think I said I am enclosing herewith a statement, something of that sort.

Q. What was your purpose in doing that? A. I knew if there was any corrections to be made, I knew there was a man who would correct me because I wanted to tell the absolute facts in connection with this matter. I had nothing to conceal.

Q. Then you did, as a matter of fact, communicate with him? A. I communicated but—I sent him that, that is the only time I have ever—that was the only time with the hope if there was any correction Mr. Lord would call me back and say so.

Q. You asked him to do that? A. No, I just said I am herewith enclosing a statement.

Q. I want to go back to your conversation which you think may have occurred on the train with Judge Davis when he first approached you on the possibility of your advancing some money to Mr. Stokley. You say you think that was in the summer time of 1935? A. That is my judgment today.

Q. You said the Judge asked you whether you had any loose cash? A. Whether I had any money to invest. I don't recall the exact words.

Q. At the time of this conversation did you have any loose cash to invest? A. I had plenty of money on hand.

Q. My question was cash. A. What do you mean by cash?

Q. What do you mean by cash? A. You mean cash in the bank or cash in hand?

By Mr. Correa:

Q. Cash on hand or in bank. A. I had cash in bank and cash on hand.

Q. May I ask you how much you had on hand and in banks at the time? A. I should have $50,000, $60,000, or $75,000.

Q. More than $50,000? A. My impression is it was more than $50,000.

Q. How much more do you think it was? A. I can't tell. I can tell by looking at the record. You are asking me in 1935.

Q. I want your recollection. A. I couldn't tell you without looking at the record. It was around $50,000.

By Mr. Willauer:

Q. At that time did you tell the Judge that you were willing to make the loan? A. No, I did not.

Q. What conditions did you impose? A. I didn't impose any conditions because he didn't know the entire condition of the loan. He had been down there, he said, and this fellow needed money, and he had some property, and he thought the property was ample security, but he didn't know the details.

Q. But in any event at the time this conversation took place you did have in your bank something over $50,000? A. In different banks, not in one bank.

Q. Did you communicate with the Judge in any way before the time of your first conversation and the time when you met in the Judge's chambers and talked to Mr. Stokley about this transaction? A. I don't believe I did.

Q. Don't you know whether or not you did? A. My impression is I never talked to him about this matter.

Q. Do you remember how my question was phrased, communicate? That will include any form of communication. Did you or did you not? A. I would say no, to the best of my recollection and judgment.

Q. Then at this conference in the Judge's chambers you agreed with Mr. Stokley to make the loan? A. On the conditions as outlined, provided every-

thing was as he stated, and provided the title was as he said.

Q. When did this meeting occur in Judge Davis' chambers? A. This check is dated the 14th of November. It may have been a couple of days one way or another. It may have been around the 12th of November.

Q. A very few days before? A. I think so.

Q. Now, let me take your situation financially at the time you made this agreement. About how much cash did you have either in banks or in the form of cash at that time? A. I must have had, I never had less than $50,000 or $60,000, may have had more and may have had less.

Q. That is exclusive of the cash you may have had outside? A. I may have had some few thousand dollars cash. We had some cash always put in the banks. We had all—we had $50,000 or $60,000.

Q. It was your practice to keep some cash in the form of currency in addition to what you had in the bank? A. Always. My father did it——

Q. I am asking you. A. Always.

Q. Where did you keep that cash? A. In the vault.

Q. What vault? A. Different vaults.

Q. Give us a list of the vaults you had in 1935. A. I had a safe deposit box in the Chemical, I think it is the Chemical, it is right opposite the Federal Bank on Liberty Street.

Q. Chemical Safe Deposit Company? A. I really don't know the name.

Q. Have you told us all you can to help us identify it? A. I think it is 32 Liberty Street.

Q. That is one. Any more? A. In 1935 I had two safe deposit boxes in Scranton in the First National Bank.

Q. In whose name was the box in the Chemical Bank? A. That is in the name of David E. Kaufman and Morgan S. Kaufman. Either of us had a right to go into the box.

Q. The same information as to—— A. (Interrupting) I think the same holds true with every box I have ever had.

Q. You had two boxes in the First National Bank of Scranton? A. I had it first in the Third National Bank of Scranton.

Q. Any more? A. I had a box right under my office in the Anthracite Trust Company. It is out of business now.

Q. In what city? A. Scranton.

Q. Any others? A. That is all I can recall. You are speaking?

Q. 1935. A. I didn't have a box in the Anthracite Trust Company in 1935.

Q. When did you get that box? A. I had that long before. That went out of business around——

Q. You no longer had that? A. No, just the two boxes in the First National Bank, and I think I had one in the Third National Bank at that time.

Q. Did you get any new boxes in 1935? A. No, I didn't get any new boxes until I moved into the Bankers Trust Company Building.

Q. Where is that? A. In New York. I have a little office there and I took a box downstairs.

Q. About when? When did you rent that box? A. Some time in 1936 or 1937.

Q. Did you keep cash in all those boxes? A. I have had cash in all of them at different times.

Q. You said that you always had about $50,000 in your bank accounts, is that right? A. I think so. You are speaking of what year?

Q. 1935. A. I assume I had that. It may run $10,000 or $15,000 one way or the other. I would

say I had practically $50,000 in the banks at that time.

Q. In 1935 where did you have bank accounts? A. I had bank accounts in Scranton and in New York.

Q. Will you give us the banks? A. Public National Bank, New York City; First National Bank in Scranton; Third National Bank in Scranton. I think I have a savings account here that I have $10,000 or $12,000 in the Sterling National Bank, wherever that is located.

Q. Is it in New York? A. Yes. I gave it to a friend of mine. He was out getting deposits and I made the deposit and they have been paying 1½%.

Q. I don't care about that.

By Mr. Correa:

Q. Who is your friend? A. I can't recall. It is some years ago.

Q. How long ago? A. I could tell by looking at the book.

Q. Did you put $10,000 in? A. I think about $5,000, and then I added $5,000.

Q. You opened with $5,000? A. I think so.

Q. How did you come to meet anyone connected with that bank? A. I can't recall. Years ago they used to go out looking for accounts.

Q. How long ago was this? A. I can't recall. My bank book will show it. I can bring my bank book.

Q. You can't recall who solicited the account? A. No.

Q. Who handled your account while it was there? A. I don't know that.

Q. Have you still got the account? A. Yes.

Q. Have you had any communication with anybody in that bank? A. Every six months or every year my secretary sends the bank book in and they

put the interest on and send it back. That is as far as I have gone with it.

By Mr. Willauer:

Q. This check, then, is on the Public National Bank & Trust Company? A. Yes.

Q. What was the status of your account in the Public National Bank & Trust Company at the time this check was drawn? About how much of a balance did you have? A. I couldn't tell you. My bank book will show.

Q. Was it over $10,000? A. I couldn't tell you. It must have been over $10,000, otherwise they wouldn't have paid the amount.

Q. Did you have a substantial balance in that bank all during the summer of 1935? A. I couldn't tell you without looking. I was never overdrawn.

Q. I notice that check is made out to B. F. Lord, attorney. Who did you say Mr. Lord was? A. He is the first Assistant United States Attorney in New Jersey.

Q. Who was he then? A. The law clerk for Judge Davis.

Q. He gave you his name so you could make out the check? A. I knew Mr. Lord, and I suppose he gave me his name at the time.

Q. You don't recall having written down a notation of his name? A. I might have, I don't know. I don't think so.

Q. Did you know, as a matter of fact, his name was not B. F. Lord? A. I didn' know that. I assumed B. F. Lord was correct. He signed it B. F. Lord; I think the check is signed B. F. Lord.

Q. You told Mr. Lord was the man you had heard who was quite brilliant or some such thing. A. I think in a conversation one day with the Judge we discussed law clerks. I wanted to get—there was a fellow that wanted——

Q. Such information as you had on Mr. Lord came from what source? A. Judge Davis told me he was one of the ablest lawyers he had ever met.

Q. Is that why you wanted him to search the title for you? A. No, I wanted a man I had confidence in to search the title.

Q. Did he search the title? A. I don't know. He brought me back a guaranteed search of title.

Q. Your instructions to him were to go down and search the title? A. Yes. I said I wanted a guaranteed search of title.

Q. Do you know whether or not he did search the title? A. I don't know. He sent me all these papers.

Q. You said the reason you wanted Mr. Lord to go to Florida was to search the title, and yet you say you do not know whether he did search the title. A. He sent me back the search of title.

Q. That is a title insurance policy? A. Yes.

Q. Was that what you asked him to get you? A. I don't remember whether I asked him that or not. My impression was he was to get a search of the title.

Q. Did you ever ask the Judge whether this man knew how to search a title? A. No.

Q. You never made any inquiry as to his ability in that respect? A. No, I don't imagine.

Q. As a lawyer you know the search of a title is a rather specialized job? A. It is and it is not. If you can follow the indices of the thing—I never searched a half a dozen titles in my life, yet I can search a title if I had to. It is more clerical work than anything else.

Q. It is a little different in each state, isn't it? A. The indices are different but there isn't much in searching a title.

Q. And who arranged for that title insurance policy? A. I don't know.

Q. You said there was an agreement made for allowing Mr. Stokley to pay this money back? A. Yes.

Q. And if I recall your testimony correctly, that agreement was worked on between you and Mr. Lord before you left to come back to New York, and then it was completed by Mr. Lord and sent by Mr. Lord to you in New York, and you signed it, is that right? A. Yes, sir.

Q. Then you sent it back to Mr. Lord? A. Yes, sir.

Q. Have you got a copy that you retained? A. This is a copy, I didn't retain it. I sent it back for his signature, and there are the signatures to it. I signed it in the presence of my two secretaries that day.

Q. Is that your signature? A. Yes.

(Paper marked G. J. X. 45.)

Q. You swore to this agreement? A. No, I don't think I did.

Q. Did you acknowledge it before a notary public? A. I don't have an acknowledgement on my copy, I can't recall.

Q. Do you recall ever having acknowledged it before a notary public? A. I may have, I don't remember. I sign so many papers that I acknowledge.

Q. If you did acknowledge it I assume you did it at the time you signed it, did you not? A. I suppose so. I don't remember much about the acknowledgment. It was during that time I was acknowledging hundreds of papers for the Strouse Company.

Q. Now, this Exhibit 45 that I showed you was acknowledged, and the date of the acknowledgment is March 18, 1937. I show it to you. A. I acknowl-

edged it all right, I must have acknowledged it. They usually take my acknowledgement from the notary, we just send it over and they know my signature.

Q. Do you have any recollection of appearing before a notary public to acknowledge that? A. No, but this is my writing, and the acknowledgment New York—that looks like my writing.

Q. At least, you filled out the words in the acknowledgment? A. I must have acknowledged it because this is my writing; otherwise, I couldn't say whether it was or was not. The City of New York and the 18th of March is my writing.

Q. That is well over a year after this instrument purports to be signed, is it not? A. Yes that purports to be—what date is that—the 18th of March, 1937? I must have acknowledged it. Evidently I must have sent it back. I didn't think he was going to record that. I see it is recorded. In our state we don't record those agreements.

Q. Do you have any recollection as to whether it was sent back? A. I have no recollection. I wouldn't have known now if my handwriting hadn't been on there, but I can see what happened, he wanted to protect himself by having it recorded so I couldn't put any liens on the place.

Q. As a matter of fact, this is an agreement to redeem this property, isn't it? A. Yes.

Q. Without this agreement you, on the face of everything, owned Mr. Stokley's property free and clear without restraint? A. That's right. I had no right—I think in this agreement you will find I had no right to put any liens on this property. I never knew it was recorded until this minute.

Q. Have you any recollection as to the circumstances under which you acknowledged this instrument? A. I can't recall.

Q. You don't know whether or not you did in fact acknowledge it? A. I did acknowledge it because it is in my handwriting.

Q. Do you have any recollection of appearing before a notary public? A. I can't recall. No, I have no recollection now.

Q. In so far as you know about this thing—all you do know is that it does bear a notarial certificate and signature, and that in the clause having to do with the acknowledgment there are certain words in your handwriting? A. I must have appeared before the notary public because my handwriting is on that acknowledgment.

Q. A little while ago you told me you very often sent instruments over to a notary public and they would acknowledge those instruments without your being present. A. Yes.

Q. Could that have happened in this case? A. No, for this reason: I thought I did, but seeing that I filled it out myself I must have appeared personally; otherwise, I would have sent it, it might have been sent out. My handwriting appears personally there. I must have been personally present.

Q. What makes you think that this instrument was signed on November 25, 1935? A. I think that was the date that they all agreed that all the papers were signed, on the 25th when I sent it. Let me have that again. I will tell you why. If I am not mistaken, I left that to my attorney. That 25 is not my signature, and I left that, and I left that to New York—I guess I wanted to have all papers conform to the same thing, to the 25th of November, all of them.

Q. You say you left that with your attorney? A. Yes, I left everything to my attorney.

Q. What attorney was in on this transaction? A. What do you mean, what attorney was in on that? I left that to Mr. Lord. I sent this back to Mr. Lord.

Q. Was Mr. Lord the only attorney who had anything to do with this transaction? A. As far as I know.

Q. Is he the person you meant by that remark, you left it to your attorney? A. That is all I know. Certainly, I had no other attorney in this case, he took care of everything.

Q. Judge Davis was shown a copy of this blank agreement, wasn't he? A. Not to my knowledge.

Q. Did you ever tell Judge Davis that you had agreed to make this loan? A. I don't think I did.

Q. Has any money ever been paid back to you by way of repayment on this loan? A. Paid, no.

Q. Has any interest ever been paid to you? A. Yes, he paid $200 in 1936, $200 in 1939, I think.

Q. Have you a record or some evidence of these repayments? A. Yes, it is in the bank, it is in my check book when it was deposited.

Q. Is this a record? A. No, these are two letters that he wrote to me in which he said that he couldn't pay it in 1938 because of the markets.

'May 11. For your information, have both the city, state and county taxes paid on my contract with you, but as you know, on December 20 we had a frost that damaged the orange crop and the markets are taken advantage. So, do not believe we will receive much of the remainder of our crop. I am doing my best. I believe with one or two good crops I can pay it. However, if you demand settlement I find I can get a loan here from a neighbor.

Thanking you for bearing with me thus far,

Very truly yours,

Stokley.'

This is in May, 1938 and in 1937 he wrote me,

'I am sorry to explain how little I realized out of my fruit crop, but as doubtless you know' I can't make out the word—'has been in your northern market. After all, taxes have amounted to almost $5,700. This, as you know, since you made me the loan.

I am going to do my best to make another payment on interest this year. I will be frank with you, I have made some payments on another obligation or I could have paid you more.

I shall do my best in the future and if I have one or two good crops and the fruit sells only fair price, I will be able to pay up in full, and I hope you will be patient with me, that I am doing my best.

Yours truly,

C. L. Stokley.'

That is dated April 7, 1937.

Q. I would like those letters, please. A. Yes.

(Marked Grand Jury Exhibits 46 and 47 this date.)

Q. Then the only interest you have been paid is $200 in 1936, is that right? A. I think so.

Q. And $600 interest what year? A. I received $800 I think it was this last year.

Q. Was that interest paid by check? A. Yes.

Q. Was it deposited in your bank account? A. Yes.

Q. Do you remember what bank you deposited those interest payments in? A. I can't tell you what bank it is, but I will tell you what bank it is in the

morning. If you will let me see the check book it will show it.

Q. You are sure those interest payments were by check? A. I am positive.

Q. Did you ever receive any cash from Mr. Stokley? A. No.

By Mr. Cahill:

Q. May we have the date of the second payment, the last $800 last year, 1939 was the last year? A. Yes.

Q. The letter you read was in 1938? A. I read one letter, what year was that?

Q. You got the payment in 1939? A. Yes.

Q. What is your best recollection as to the month in 1939 you got the payment? A. In the summer or spring.

Q. Would that be in June or July? A. Either May, June, or July.

Q. What bank did you put that check in? A. I couldn't tell you what bank, but I can tell if I had——

By Mr. Willauer:

Q. You never at any time received any payments of cash from Mr. Stokley for any cause whatsoever, have you? A. No, sir.

Q. You have described in general this transaction with Mr. Stokley which the Judge spoke to you about, and I believe we got on to that transaction because I asked a question as to whether you have ever had any financial transactions of any nature with Judge Davis. A. That is correct.

Q. And you answered no to that question? A. I never did have, because my affidavit shows that. I do not consider that a transaction with Judge Davis. That is why I said no."

On page 624 the witness testified as follows:

"Q. Have you made any loans to Judge Davis? A. Not that I can ever remember of.

Q. Of any nature? A. Not that I can recall, loans of any kind.

Q. Don't you remember whether or not you made any loans to Judge Davis? A. I don't think I ever did.

Q. Can't you say for certain whether you ever made any loans to him or not? A. I would say that I did not. If you asked me, I wouldn't say I did not.

Q. Are you in some doubt as to whether you made loans to him or not? A. No. To the best of my judgment now, I don't think I ever made any loans to Judge Davis.

Q. Would you not recall if you had made him a loan? A. I might have, but I can't recall of any loans I ever made to Judge Davis.

Q. If you had made any loans to him would the checks which you have turned over to us, to this Grand Jury pursuant to subpoena show such a transaction? A. It ought to, it ought to.

Q. So that if any such loan was made it would be reflected in your books, is that right? A. Absolutely.

Q. And if there is no such loan reflected in your books, your testimony is no such loan was made? A. No such loan was made.

Q. And you have no recollection of making such loan? A. And I have no recollection of making such loan."

The witness also denied he ever had any stock transactions with Judge Davis, page 625. However, on the same page the witness testified that he got a statement from Ungerleider and Company claiming that he owed them

$9,000 or $14,000, that the statement was marked, "J. Warren Davis in care of Morgan S. Kaufman, or Morgan S. Kaufman care of J. Warren Davis."

He said he called up the firm and said he never got the stock and never had anything to do with it, that he never did any business for Judge Davis, and that they told him it was a mistake and he would never hear anything more about it.

He, however, received a further statement of the same character, and when he protested, they gave the same answer.

He also denied at page 628 that he had "the slightest idea" of how the account entitled J. Warren Davis, care of Morgan S. Kaufman happened to be opened in that name. The witness said he never spoke to Judge Davis about this at page 629.

The incident in question he thought took place in 1930 or 1931, page 630.

After certain questions regarding an effort to secure the release from the penitentiary of one Weiner, which he argued in the Circuit Court of Appeals, the witness was asked and denied any recollection as to whether the loan to Stokley had been agreed to prior to the argument of that case. The witness further testified at this point as follows, page 651:

> "Q. With respect to the other date, that is the date of your decision to loan $10,000 to Stokley that the Judge had requested you to do—— A. He hadn't requested me to do any such thing, please. I dont want to take issue with you, but I have told you exactly how this came about yesterday. The Judge had no more to do with it except to suggest it, not request it, suggest it, that if I had this money to loan, why, all well and good.

Q. If you had $10,000 to loan? A. No, I told you exactly what he said yesterday.

Q. Is this a statement of what happened, the Judge said to you if you had this money to loan he had a relative that could use the loan? A. No, not in that language or anything like that. He said in an incidental way, have you got any loose money, or things of that sort, that you want to make an investment on, and I said it depends on what kind of an investment, or something of that sort. He told me about this relative of his.

Q. And he said it was an investment, not a loan to a relative of his, did he not? A. Not an investment. He wanted to know if I would make a loan, if I was interested in making a loan of $10,000 on property that is worth $40,000, something like that.

Q. A loan to whom? A. A relative of his, I think he said a relative or a cousin, I won't say cousin.

Q. He wanted to know if you would make a loan to a relative of his in the sum of $10,000 on certain security, isn't that right? A. No, he said would you be interested, have you any money that you want to invest, would you be interested in making a loan of $10,000. 'Would you be interested in making a loan?'

Then he described the property to me, that is in a general way. He said, 'I don't know enough about the particulars of it.'

Then, I said, 'do you expect him down here?

He said yes, he will be down.

I said when he does come, give me a ring.

I hadn't heard anything for six or seven——

Q. When did you decide you would be interested in making this loan? When did you finally decide to make the loan? A. After I sat down and talked to the man in the presence of Mr. Lord he told me what collateral he had.

Q. When? I am not interested in what you did. When? A. On the date of the check.

Q. On November 14, 1935? A. Somewhere around there, that is correct.

Q. I don't want somewhere around there; is that the date? A. It can't be the date, it can't be that date.

Q. Here is the check, if that will refresh your recollection, or a photostatic copy of it. A. It must have been a day or two before this.

Q. A day or two before the date the check was signed? A. It might have been the 13th or the 12th.

Q. Can you fix it any more closely than that? A. Not closer than a day or two.

Q. Was it a week before? A. No, I don't think so. I think it was the next day.

Q. Was it a month before? A. No, it was the next day.

Q. You are perfectly certain it wasn't as long as a month before? A. I am quite sure.

Q. Are you quite sure it wasn't as long as two weeks before that? A. My impression that it was either the next day or two days or three that passed. That would be the limit. I may be wrong about it, I am giving you my best impression.

Q. You mean you are giving me your best recollection? A. My best recollection, I may be wrong about it, I don't recall.

Q. That check is dated November 14, is it not? A. That's right.

Q. Judge Davis' first suggestion, as you choose to call it, to you respecting this loan to his relative was in the summer of this year? A. Of that year.

Q. 1935, is that correct? A. I think that is my best recollection when I made the statement. I thought it was the summer, it may have been a little earlier than the summer.

Q. And you were seriously considering making that, were you? A. I wasn't seriously considering anything. The fellow just told me, and nonchalantly I said when the fellow comes here let me talk to him, and paid no more attention to it.

Q. Did you tell the Judge at that time you would lend the money? A. I did not.

Q. You did not tell him that? A. I did not tell him that.

Q. Did you tell him you had the money to loan if the loan looked good? A. I didn't tell him anything of the kind.

Q. You understand what I am trying to get at isn't a commitment on your part, but did you say to him you had the money and if the properties looked good, you would go into it? A. I might have said if things looked as well as he said to me, I might be interested.

Q. You say you might have said that? A. Yes.

Q. Do you recall whether you said that or anything substantially like that? A. Substantially, I can't recall.

Q. Did you say substantially that? A. I might have said that, I think I did. I can't give you the exact words.

Q. How long before that check was issued did you have your conference with Stokley? A. I just said I don't know whether it was a day before or two days before, or a week before, but my impression is that it was a day or two before.

Q. How long before that check was executed and your conference with Stokley had been arranged were you notified Stokley would be up? A. I said either that day or the next day, I am not sure as to the date.

Q. Did you know he was coming up in advance? A. No, I did not know anything about it, it was all news to me.

Q. You just said a moment ago you were convinced that it was a good loan at the time you signed that check. A. I was satisfied the loan was ample security—that the security was ample, rather, for this loan.

Q. May I ask who convinced you? A. Well, Mr. Stokley told me about this other property, that they were $30,000——

Q. I am not interested in what he told you. Who was the person who convinced you? A. Mr. Stokley in the first instance, and the Judge told me anything that man said you can rely on.

Q. So it was Mr. Stokley and the Judge? A. I wouldn't say the Judge. The Judge told me anything he said I can rely on.

Q. Would you say it was Mr. Stokley with the Judge's endorsement? A. No, I wouldn't go as far as it was his endorsement. I simply took his word for whatever he said. I think the security is ample today."

There are some further questions and answers with respect to this transaction, but they are only a repetition of what has already been quoted above. Further testimony, page 657, was as follows:

"Q. Now, for your information the record discloses that the Weiner case was argued before the Circuit Court of Appeals for the Third Circuit with Judge Davis sitting on November 8, 1935, six days prior to the execution of that case, is it not? A. That may be possible, yes.

Q. Did you at the time of that argument inform the representatives of the United States who were arguing the other side of the case that you had negotiations pending with a relative of Judge Davis, who was sitting on the case, looking towards your mak-

ing a loan to that relative? A. No, I never knew about it.

Q. You never knew about it? A. I never knew about this loan on November 8th, that is, I hadn't done anything about this loan on November 8th.

Q. You hadn't done anything about this loan on November 8th, had you? A. Not that I can remember.

Q. The Judge had spoken to you about the loan, hadn't he? A. Away back in the summer he said something to me about a loan. I didn't say I was going through with it, or anything. He just said something to me, I passed it off and never said another word, never gave it a thought.

Q. So that on November 8th when you argued the Weiner case you did not know you were going to make a loan to Stokley? A. I did not.

Q. Are you quite sure of that, sir? A. If my recollection serves me right, the only time I saw Stokley was a day or two before this, and I never had any real talk with the Judge about this except once that I can recall of.

Q. Perhaps we can help your recollection. Can you say if you had known you were going to make a loan to Stokley you would certainly have advised the other side? A. No. If I had made a loan to Mr. Stokley, it had nothing to do with the Judge. It was purely a matter between Mr. Stokley and myself. It meant nothing to the Judge.

Q. Even though the loan was made at his suggestion—I use your own word—of the Judge to a relative of the Judge's? With that amendment does your answer still stand? Please answer responsively. A. I couldn't answer that question. That question is subject to a lot of dynamite, as you well know. I couldn't as a lawyer answer that question.

Q. Do I understand you are availing yourself of the privilege, sir? A. No, I don't want to avail myself of any privilege.

Q. Is the question not clear in any respect? A. Yes. Will you let me have one second——

Q. At this time I want answers to the questions. If it isn't clear in some respect I will withdraw the question and reframe it. Listen to the question and see if you can answer this one. If at the time you argued the Weiner appeal before the Court which consisted of Judge Davis and others, you knew that you were going to make a loan at the suggestion of Judge Davis to a relative of Judge Davis, would you have apprised your opponent, the representative of the United States, of the fact? Can't you answer that question yes or no? A. I would like to answer that question with a qualification.

Q. I insist, sir, that you tell me first whether you are able to answer it yes or no. A. I don't like the word suggestion there of the Judge. If a man simply says do you want to make a loan, that is one thing, but he didn't say that. He just nonchalantly asked me whether I was interested in making a loan, and if I thought for one moment that the Judge was interested in that loan it was my duty as a lawyer to notify the other side, I would say that. If I thought the Judge was interested in this loan, it was my duty to notify the other side, but I did not know, and I do not even know today that he had any interest in this matter whatsoever.

I am not protecting the Judge in any way. Don't misunderstand me. I am just giving you the absolute facts.

The man owes me the money, there is no question about it, and I still say that he owes every nickel of it, and no one is interested in that $10,000."

After considerable prodding the witness said that if he had thought Judge Davis had an interest in the loan, it would have been his duty to notify his opponents, and also the duty of Judge Davis to notify his brethren on the bench. He, however, denied that Judge Davis had any interest in the loan. The examination is not particularly important. It related mainly to Kaufman's idea of ethics.

The witness denied any knowledge as to whether Judge Davis had any other financial transactions with Stokley. The examination was not particularly important, as quite obviously Kaufman's ethics were not in issue in the case.

The examiner returned to Stokley at various times, but Mr. Kaufman stuck to his story as outlined above, and I can find no material variation in it. There was, however, one other part of his testimony which may be of interest, page 695:

> "Q. Did you think it entirely right for Stokley to pay his interest, or pay the interest due on other mortgages on other properties and not pay you your interest? A. I didn't think at all. He wrote to me here that he had to pay other people's interest.
>
> Q. I am referring to April, 1936. A. I don't know anything about April, 1936.
>
> Q. You knew, though, you did not get your interest? A. I read about it recently, that's the first time I really knew he had some other mortgage on another piece of property, not on this piece of property.
>
> Q. What other mortgage did he have that you have read about recently? A. Well, he had a mortgage on another piece of property mentioned some time, I can't think of the name of the town, for $4,000.
>
> Q. Who was the holder of that mortgage? A. My impression was that Judge Davis was the holder

of it. Now, I am not so sure; that is what I read in the newspaper. It was only a few months ago when this investigation started.

Q. You read in the newspaper, according to your best recollection now, that Judge Davis had a mortgage of $4,000 on another property of Stokley's, is that correct? A. Yes, sir.

Q. Did you read when that mortgage was placed on this property? A. No, I don't think it said anything about it."

The witness said he made no inquiries about this other mortgage. At page 698 the witness described an interview with Judge Davis in the Pennsylvania Station, New York, after the investigation had begun. The interview took place at Judge Davis' request. The conversation had no particular significance except in the fact that Judge Davis sent for Kaufman and complained about an investigation being made, when he said he had done nothing to be ashamed of.

The witness was further asked in reference to whether he made any investigation when he heard that Judge Davis had borrowed money from Stokley and taken a mortgage on his property, but he said it was a different transaction and made no impression upon him.

He claimed that he had no doubt he could recover his $10,000 any time he wanted to. He said, page 702:

"A. The property is worth $40,000. I don't see where I took a chance in a thousand of losing a nickel."

The witness was also asked other questions somewhat along the line of examination previously referred to as to whether he did not think it his duty to advise the Judges of the facts regarding the Stokley loan. The examination was not particularly important.

The witness also said at various points in the examination that he had not made efforts to collect from Stokley the money due him.

At various points in his testimony, particularly at pages 722 et seq., Kaufman made it clear that he made the loan to Stokley based entirely on Stokley's statement and relying on Mr. Lord. He never made any further inquiries and really knew nothing about the property. He had never been informed whether a lien for state and county taxes which the title policy excepted had been paid off.

The witness admitted intimacy with Judge Davis but said he never paid any of his bills for entertainment, page 730.

Beginning at page 749, the witness was asked certain questions about the "Root case". He said he brought down all the correspondence he had, but that many of his papers had been thrown away. This destruction he said had taken place in 1936 (page 751). The witness had no records of what records he had destroyed. He further testified:

> "Q. You are testifying to us that you threw away records pertaining to the Root case? A. I don't say that, I am not sure.
>
> Q. Wasn't the Root case going on in 1939? A. No.
>
> Q. Was there no phase of the case still pending? A. Not that I know of."

The witness was directed, page 753, to bring all the records of cases which he had in Pennsylvania, and which he had thus far neglected to do.

At page 757 the witness described his office in New York as one main office and a small office for the stenographer.

He had three filing cabinets, and only one employee. The secretary does all his personal work.

He said he appeared as attorney of record in most cases in which he was connected, except "possibly one case I did not, I was not of record."

"Q. What case? A. The Universal.
Q. The Root? A. Yes."

That was page 762.

Page 763:

"Q. With respect to the Root case, which office did you operate from in connection with that case? A. I didn't operate much in that case, I didn't have anything to do with the actual work, the actual trial.

Q. I don't think you have answered my question. Which office did you work out from? A. I didn't work out of any except having conferences from different offices. I think Judge Haight came down to see me in Scranton once in that matter.

Q. Any papers served on you? A. Not in that case.

Q. The forwarding of papers, where would they be sent to? A. I didn't have any papers forwarded to me in that case.

Q. When you procured any cases from any of the people with whom you discussed it, where did you take them? A. I took them to my office if they gave me any, but all I can recall in that case is the records.

Q. That blue record. A. I found another record there.

Mr. Willauer: By record you mean——
The Witness: The printed briefs.

Q. Is there any correspondence you brought with reference to that case? A. Yes.

Q. Now, the papers outside of correspondence? A. That is all.

Q. Did you have any other case with the Universal Oil Company? A. Yes, I had the Crew Levick case.

Q. Did you have any other matters? A. No, sir.

Q. Are you still on the Crew Levick case? A. Yes.

Q. Is that still pending? A. Yes.

Q. What court is that in? A. U. S. District Court for the Eastern District of Pennsylvania, Philadelphia.

Q. Before what Judge? A. Judge Welsh heard the last argument in the case.

Q. Outside of these cases, the Root case and the Crew Levick case and the Universal Oil case, have you done any other work for Universal Oil? A. I don't think so.

Q. You have recently gone through your files subject to the request of the Grand Jury? A. Yes.

Q. And an examination of your files disclosed you have no other matters with them, right? A. As far as I remember.

Q. Were you general counsel for them? A. I am now in Pennsylvania.

Q. You have had no other matters in which you have given the men advice at all? A. Practically so.

Q. You found no papers in your files? A. No.

Q. When was the first time you came in as general counsel for Universal Oil in Pennsylvania? A. Some time in the latter part of 1935.

* * * *

Q. Have you done any considerable work on any other case outside the Crew Levick Company and the Root Case? A. No.

Q. Have you done any work which would warrant any payment to you of any fees? A. No. I wouldn't think so."

That is page 765.

"Q. Have you given them any advice, meaning the Universal Oil Company, with respect to the management of their corporate affairs? A. No."

This is page 766:

"Q. Who are their general counsel, do you know? A. I think Judge Haight, and Mr. Thomas, and possibly Mr. Behrens.

Q. Do you remember whether you have ever given them any advice with respect to corporate matters? A. When you say corporate matters, what do you mean?

Q. Meaning the general conduct of their corporate policy. A. I don't think so."

The witness also said, page 766, that he had handled no case out of his Scranton office from 1934 to the present time.

He said he had produced all the records that he had in any of these cases. He also testified, at page 767:

"Q. And if any briefs would be drafted, they would also likewise be drafted in the New York office? A. Yes, but most of the briefs that were drafted, for instance, if it was in Philadelphia it would be in the Associated Gas office, or if it was on the Universal it would be in the Universal office or over at Judge Haight's office and copies would come back to me, and I would re-draft them or send them back in such form as I thought would be necessary, or go over there and straighten the thing out."

He also testified at page 768, as follows:

"Q. Do you have any office outside of the office in Scranton or the office in New York? A. I have my name on the door in Philadelphia.

Q. Whose office is that? A. David E. Kaufman.

Q. That is your brother? A. Yes.

Q. Do you have any files there at all? A. I don't think so."

The witness testified at page 769 that he and his brother were joint owners of all their property and affairs, and that his brother received half of all his legal fees.

The witness said at page 878 that he is on a regular retainer from the Pennsylvania Railroad for matters pending in Lackawanna County, but testified that he never represented them in court, and did practically nothing except "sometimes collections."

The witness was paid $25,000 for discussing with Wilson, then Mayor of Philadelphia, the question of securing a contract for the Pressed Steel Car Company for the manufacture of subway cars for the City of Philadelphia and procuring said contract for the company. This did not involve any litigation.

At page 821 the witness testified:

"Q. When was the last fee you received from the Universal Oil Company? A. I think it was the latter part of December.

Q. What year? A. 1936.

Q. You have received no fees in 1937 or 1938? A. The records would show, I can't recall.

Q. If you have received any fee, it would be on those records? A. Absolutely.

Q. I thought you testified the other day you now are general counsel for the Universal Oil Company in Pennsylvania? A. I did.

Q. Are you receiving any compensation for that? A. I haven't received a fee in 1938 or 1939 for the reasons that the case which we have here is in status

quo awaiting a very important decision from Illinois, and we will not proceed with the case in Pennsylvania until we complete the case in Illinois."

At page 822:

"Q. Mr. Kaufman, I am referring at this time to this list of cases you sent us and also the cases that you had in your file. Now, I see the first case on this list is Universal Oil Products Company, Crew Levick Company. Who was your client in that case? A. Universal Oil Products.

Q. Was that the first case you had with that client? A. Yes.

Q. Had you ever done any work previous to the Universal Oil Products, Crew Levick case before then? A. No, sir.

Q. How did you come to be hired by them? A. A man by the name of Belknap called me. He was general counsel for Universal Oil Products.

Q. When was this, about, sir? A. That was about, I think, in 1932, the spring of 1932.

Q. Yes. A. And he called me on the phone, I was at Scranton, and he told me who he was, general counsel for the Universal Oil Products, and wanted to know where he could see me. I said I expect to be in Philadelphia tomorrow.

He said what time?

I said I will be there about two o'clock.

He said where can I see you in Philadelphia?

I said at the Bellevue-Stratford Hotel, and I drove down there and I saw Mr. Belknap at that time.

Q. Did anyone ever introduce you to him? A. No.

Q. He just called you on the phone? A. He called me on the phone.

Q. Will you describe what took place at that time? A. Well, I met him there and he told me—of course, then he introduced himself to me again, that he was general counsel of the Universal Oil Company, told me what it was, and went into details concerning the original patent that they had and the successor of the famous Dubbs patent for cracking oil.

He told me they had a very important litigation in Wilmington, Delaware, at that time. He told me who the counsel were in the case, who their local counsel were, and he wanted to know whether I represented any other oil companies, and I said no, I said I represented some gas companies but don't represent any oil companies.

Well, he said, now, we don't want you to represent any other oil company. He said that is understood.

I said absolutely.

And he went on, he talked a great deal about the merits of the case. He told me who the president of the company was.

Q. That was the case in—— A. In Wilmington, Delaware.

Q. Do you know the name of that case so that we can identify it? A. The Universal Oil Products v. Root Refining Company, and he—we talked a great many things, I can't recall just everything that was said, but he then told me that he would get in touch with me from time to time, and then just before we finished our conversation he said, 'Now, with reference to a retainer, do you want a retainer now or would you rather wait until the case is over with?"

And I said well, that is purely up to you.

He said I think you will fare very much better if you wait until the matter is over.

Well, that is substantially all that took place, and he talked a great deal about the matter of the patent and he told me about how far the case had proceeded. They hadn't got through with the testimony, and they were having hearings, and so forth, I think he told me at the time.

Q. Would you continue? A. Well, after that I called him several times and he told me that they got through with the testimony in Wilmington, and then the latter part of the year I called him and he told me there was nothing new.

I came back. I went to Florida in 1933, and I came back to take charge of the S. W. Strouse Company here. I picked up the paper one morning that he had or dropped dead, I forgot what it was, and I called up the Universal and got Mr. Halle on the phone and told him how sorry I was, and he seemed to know all about me, and I first introduced myself to him, and he said yes, I know all about you, and we talked quite a while, and he said he would be glad to see me sometime.

That was substantially the matter that I had with Mr. Belknap.

Q. Would you continue and tell us your relations with that particular company? A. After the decision came down from Judge Nields in Wilmington, Judge Haight, who was one of the counsel in the case, came over to Scranton to see me about the matter one day, and we talked about the matter, and Mr. Belknap told me whichever side would lose there would be an appeal taken, the case would go all the way up, that it was a case of grave importance and involved millions of dollars, and I went over then to see Judge Haight several times in Jersey, and later on I went over to the Universal Oil Company at their offices.

They were preparing their brief or paper book, as we call it. The other side had taken an appeal, and I spent the afternoon discussing different matters with them, and the case was argued either late that year or the early part of the following year, and later on the case was decided—it was decided in favor of the Universal Oil Company by the Third Circuit, and a petition for certiorari went up to the Supreme Court of the United States and they refused to grant a certiorari, and the case was won.

Q. As you are going along I don't mean to interrupt you, but you are telling us the progress of the case, and what I am chiefly interested in is your connection with the case. A. I am telling you my connection with the case. That was substantially my connection in the case. He did tell me at the time—Mr. Belknap—that there would be some other work they had, some very important litigation in Pennsylvania, and that is about the whole sum and substance of it.

Q. What did you do in this particular case? A. Well, just as I have outlined here, I was retained to do anything they wanted me to do, and I was advised not to take any other case of any other oil company at the time, and outside of the conference, that conference that I had with the lawyers, that is about—I did not take part in the argument of any of the case, I did not take part in the trial.

Q. Did you prepare any of the papers, sir? A. Not to any extent except as they sent me over the rough copies, and the briefs, and so forth, and we had a general discussion over there that afternoon.

Q. Did you do any actual work upon the briefs? A. No, except in conferences, that is about all.

Q. Would you continue now and tell us your relation to Universal Oil Products from that time on down to the time that affirmance came from the

Third Circuit Court of Appeals? A. They affirmed the case and then the case went up to the Supreme Court of the United States.

Q. The affirmance was in favor of the Universal Oil Company, was it not? A. Yes.

Q. Davis wrote the opinion in that case? A. I don't think so.

Q. He sat on the Court? A. I was not there in court at the time. I got a copy of the opinion, it was sent to me, but I don't think—I am quite sure it was not Davis who wrote the opinion. That is my best recollection now. I think the record will show it.

Q. All right. Will you continue, please? A. Well, with that case or with the other case?

Q. With that case. What is your relation with the Universal Oil Company with respect to that case? A. Well, after the case was affirmed——

Q. Did you have any other work to do with respect to the case? A. After that date?

Q. After the affirmance. A. No.

Q. Did you ever have any consultation with respect to the case after that time? A. No. After the case was affirmed I called up Judge Haight, and he was out of town. I think he was on a vacation, or in Europe, I don't know where he was. Then I called up Mr. Halle, who was the president of the company.

Q. How long after the affirmance of the case, sir? A. I think it must have been some time in September. I called him up when I got back there maybe a week later around the early fall, I would say September.

Q. Did you follow the progress of that particular case? A. Oh, yes.

Q. You were interested in the outcome? A. Naturally.

Q. And subsequent proceedings in the case? A. Yes; and I called up Mr. Halle and asked him—I said to him I would like to come over and see him. He said come over. I came over there and we discussed the case. He seemed to be very happy as to the final outcome, and I said I came over here to talk about my fees.

Q. That was in your telephone conversation? A. No.

Q. You just said you wanted to see him? A. I wanted to see him, and then after he asked me to come over, I did go over there to see him personally, and we discussed things first in a general way, and he said to me let's see, how long have you been retained?

I said I think I have been retained about 3½ years.

He said, well, what is your thought in the matter, or idea? I can't give you the exact words that were used, but the substance of it.

Well, I said, in view of the importance of the litigation and in view of the millions of dollars involved here I thought that a fee of $10,000 a year would not be improper or unfair, or something of that kind.

He then told me there is a petition for certiorari in the Supreme Court of the United States.

I don't think they will get very far because there is no question involved that they would have the Supreme Court take a case of that kind.

Then he said so our lawyers advise us. He thought a while and then said of course, we have—I don't know whether he said at that time or at a subsequent time, we talked about other litigation in court, and then he suggested $25,000 for my fee.

Q. At that same conference? A. At that conference; provided, he said, everything is all right in the Supreme Court he would recommend it.

Q. Had you had any previous conference to this particular conference in September with respect to your fees? A. I don't think so.

Q. Had you any conference with Mr. Halle? A. I am talking about Mr. Halle now.

Q. Yes, but any other conference with Mr. Halle? A. I doubt very much that I did have any other conference, and I say a month or so later he sent for me when I came over, and he gave me a check for $25,000.

Q. Did you ever render him a bill? A. I don't really remember whether I did or not.

Q. By letter or in any other form? A. I haven't got a copy of it, if I did. I may have, but I haven't a copy of it in my files if I did render a bill for $25,000.

Q. And what took place in that conference with Mr. Halle the second time? A. He just handed me a check, and we talked a while, and he told me about other litigation. They had a very important litigation of the Crew Levick Company he wanted me to represent, I think it was a week or so after that time, I can't recall when it was, and later on I was over there numerous times.

Q. And in connection with the—— A. In connection with the Crew Levick Company case.

Q. When were you first approached with respect to the Crew Levick Company case? A. We talked about it on that day.

Q. With whom did you talk? A. I think it was either that day or the next time, I can't recall which. I talked with Mr. Halle, and I think I talked with Mr. Behrens, I am not so sure, but I believe I did, he was there at the time. Then I talked to Judge Haight about the case, and he agreed at one time there either at that time or subsequently that my fee was to be $10,000 a year to look after their matters in Pennsylvania.

Q. Was Judge Haight at this conference with Mr. Halle and Mr. Behrens, either of the conferences? A. When that $10,000 was talked about, do you mean?

Q. Yes. A. I don't know, I am not sure about that, I wouldn't say one way or the other. He may have been and he may not have been, I don't recall it.

Q. When was the first time you did any active work with respect to the Universal Oil, Crew Levick case? A. That was some time in October or November. We started to question the jurisdiction of it to find out where we could sue. We understood we could sue in Wilkes-Barre or Scranton, and I wrote —I have a record here, if you give me the record I could go into details there. I can't recall. I am giving it to you from memory because I have papers right there in everything right there in the Crew Levick case.

Q. I would like to have your memory. A. I am afraid it would not be fair to you and to the Grand Jury if I gave my memory on dates.

Q. Before we go any further with this particular case, what type of experience did you have as a lawyer? A. What do you mean?

Q. Well, after you were admitted to the Bar, did you have any specialty? A. No. A lawyer in Scranton, he practices generally, he can't specialize in any one particular thing.

Q. Did you have any occasion to try patent cases? A. Yes, I represented I think the largest patent case in the history of America.

Q. And that was? A. The Tri-Ergon. That involved five hundred million dollars.

Q. When was that case going on? A. I started that case in 1933, I think.

Q. Was that about the time that Mr. Belknap came to see you? You said 1932. A. No, I think

Belknap retained me before that, maybe it was 1932, my records would show it. I am giving you my best recollection on dates. I can't carry these dates.

Q. With respect to your conference with Belknap, did you have any letter in writing between you and Mr. Belknap? A. I did not.

Q. Outside of this Tri-Ergon case that you say was the biggest patent case—— A. I think one of the largest patent cases in America.

Q. Have you had any other experience in patent cases? A. No.

Q. So, your first case and only case outside of Universal Oil cases was the Tri-Ergon case, is that right? A. Yes.

Q. In what capacity were you hired in the Universal Oil vs. Root case? What did you add to the picture, in your estimation? A. That is very difficult. I was retained in that case to do whatever they wanted me to do.

Q. What did you do? A. I have outlined to you what I have done in the matter. Outside of these matters I did not do anything.

Q. You had conferences, is that correct? A. That is correct.

Q. And you did not participate in the preparation of the briefs? A. Not in a way that you would call a real preparation because the preparation was not made at the Universal Oil Company. We just discussed the matter generally that day.

Q. And sat in as advisory counsel? A. Yes, in a general way, not particularly because they had great expert lawyers there on those matters.

Q. Were they expert patent lawyers? A. I assume they were. Judge Haight is considered——

Q. Do you hold yourself out to be a patent attorney? A. No, sir.

Q. Have you ever held yourself out to be a patent attorney? A. I never specialized in it.

Q. About how many conferences did you have with the attorneys for the Root Company? A. I wouldn't say how many; perhaps a half a dozen, maybe less, maybe more. I didn't keep track of it.

Q. Now, when Mr. Belknap came to you in 1932, did he say what your work was going to be? A. No, he did not. He said we want to retain you generally.

Q. Did he specify particularly that you were not to be hired by any other oil company? A. Yes.

Q. So, as far as what he told you to do, it was rather negative than positive? A. Well, I am telling you what the facts are. You can use your own——

Q. What court was it in at that time? A. It was down in Delaware.

Q. And you were not involved in any way in the Delaware case, were you? A. No, sir.

Q. Did you participate in looking over the brief or the records or anything? A. No, sir.

Q. When is the first time you did any work on the case, the first date you had any conference? A. Well, after they sent me the opinion of Judge Nields in the Tri-Ergon case.

Q. Were you of counsel in this case? A. No, sir.

Q. That is the Root case, was your name on any of the briefs? A. No, sir.

Q. You said that Mr. Belknap called you several times. What did he call you about? A. I called him, he did not call me only the once, and I called him when I was in New York.

Q. What were those conversations about? A. Generally, I asked him how he was getting along

with his matters, and he told me. We spoke generally about the matters.

Q. During this time you were actively engaged in the Tri-Ergon, is that right? A. No, the Tri-Ergon case had not been tried yet.

Q. But were you actively engaged in the preparation of that case? A. I don't recall now, I don't remember the dates. If you give me the dates, I can tell you. This is a matter of 7 or 8 years ago. I can't recall.

Q. Well, the Tri-Ergon case—where did that first start? A. I don't recall. You have the records there.

Q. Didn't it start in the Middle District of Pennsylvania before Judge Albert W. Johnson? A. What dates?

Q. In the June Term of 1932. A. Yes, it was June, 1932, that is correct, but when the case was actually tried I don't recall.

Q. And the final decision of the Supreme Court reversing the decision of the Circuit Court of Appeals that was the second decision of the Supreme Court, it was on April 3, 1935. A. They decided in October, 1934, I think, in our favor, the Supreme Court of the United States.

Q. That is October 1, 1934? A. They decided the case in our favor. Then they asked for a rehearing.

Q. The only question I am interested in now is this was just about the time—I am trying to correlate the two cases—you were talking to Belknap just about the time you were actively engaged in this Tri-Ergon case, is that correct? The terms are contemporaneous, I am trying to get your recollection. A. I don't remember. Whatever the record shows. I had my conversation in 1932 with Mr. Belknap. I don't know what the dates of the Tri-Ergon cases were.

Q. You said Judge Haight came down to Scranton to see you? A. Yes.

Q. What did he come down to Scranton about? A. Well, he came down I think on—I forget, some matters, he discussed the matter with me.

Q. Well, with respect to this particular case, here is the record in the Root case. Let's see if there is anything in there that will refresh your recollection. A. I wouldn't have any—what do you call it here—that is the only record I have in my office.

(Records handed to witness.)

Q. One is a certified copy of the opinion of Judge Nields in Delaware? A. Yes.

Q. And the other is a copy of the brief in the Circuit Court of Appeals for the Third Circuit. A. That is correct.

Q. Did you have any correspondence in that particular case between you and Judge Haight? A. No.

Q. Did you have any correspondence between you and the Universal Oil Company? A. No.

Q. Was this the usual type of arrangement which you enter into between yourself and other attorneys? A. What do you mean by the usual type of arrangements?

Q. I mean no letters in writing and nothing to signify the fee at which you were hired. A. I don't think I ever had any arrangements with fees with lawyers in writing, very rarely, unless they put it out themselves. I always took a man's word for it.

Q. Did you have any conference with Halle with respect to the fee after Belknap died? A. No.

Q. With the exception of what you have told us about? A. That is the only time I discussed it, I believe.

Q. Did you discuss with any other person in Universal or any of the Universal Oil attorneys your fee or the arrangement that had been entered into

between you and Belknap before you talked with Halle? A. I don't think I did.

Q. Did you have any arrangement with Belknap with respect to your fee? A. No, except in a general way that he spoke about a retainer. He said if you want a retainer now—I said it doesn't make any difference. He said I think you will fare very much better if you will let the retainer go on until after the case is disposed of.

Q. Did Belknap mention any fee to you? A. I don't recall that he did. He may have, but I doubt it. I can't recall. I can't recall whether he did or not.

Q. Did you ever tell Mr. Halle that Belknap mentioned a fee to you? A. I don't think I did.

Q. The $10,000 a year, is that your own idea about the value of your services? A. My impression that it is now, whether I got it from him I can't recall. I felt in view of the litigation it was worth $10,000 a year as a retainer.

Q. What was the fee you got in this case? $25,000? A. Yes.

Q. Did you give any paper in writing to Mr. Halle when you received the fee? A. I don't really remember. He gave me a check, and whether I signed a receipt or not I wouldn't swear to. I may or I may not have.

Q. What was your understanding about that particular fee of $25,000? What was it to cover? A. It was to cover the services in connection with that matter and whatever they were, as a retainer. I had been under retainer for 3½ years.

Q. And that was in connection with that particular case? A. I think so.

Q. Well, was it? A. I think so, yes.

Q. For any other case? A. I don't believe there was any other case at that time.

Q. Was there any other case under discussion at the time you got the $25,000 fee? A. I believe there was.

Q. Did you ever mention the figure of $35,000 to Mr. Halle? A. Yes.

Q. On what basis did you figure it out? A. Well, $10,000, 3½ years, $35,000.

Q. And when was the first time you found out that Mr. Halle was going to reduce that to $25,000? A. My impression is he told me that day that if the Circuit Court, or Supreme Court of the United States would not grant a certiorari he would recommend $25,000. He didn't say that I was going to get it, but that he was going to recommend that I get $25,000.

Q. What proceedings were there, if you recall, after the first opinion in favor of the Universal Oil was filed by the Third Circuit on the appeal? A. There was a petition on the other side for a certiorari to the Supreme Court of the United States.

Q. I believe I asked you and you said you were interested in the subsequent proceedings. A. Well, I meant I was interested generally. Naturally I was interested generally.

Q. Did you have anything to do with the petition for a rehearing? A. No.

Q. Did you know that there was a petition for a rehearing until I just mentioned it? A. Yes, I think I saw that in the record of the proceedings.

Q. Do you know the result of that? A. I think the rehearing was refused.

Q. And what other subsequent proceedings do you recall in this case outside of the denial of the petition for certiorari to the Supreme Court of the United States? A. That is about the only proceeding I know of.

Q. You were at no other conference, you say, with respect to this case, is that right? A. Oh, yes, I have had some conferences.

Q. I asked you whether or not you did any other work. A. I did not do any other work, but I have had general discussions with Mr. Halle.

Q. With respect to the Universal, Root case? A. Well, it was not directly on the Root case.

Q. I am now talking about the Root case and the Root case, alone. A. Not directly about the Root case, no.

Q. Then you have had no talks about the Root case since that time, is that correct? A. Well, I don't know what you mean when you say I had no more talks. We talked about the Root case a great deal off and on, you see, and then I started in the Crew Levick case. I brought that to law and equity in Philadelphia against the Crew Levick Company, and we discussed that case, and generally we discussed the Universal Oil Company case.

Q. You mean the Universal Oil vs. Root case? A. Yes.

Q. Was that case finished yet at the time after the denial of the petition for certiorari? A. That case was finished.

Q. Then what did you discuss about the case? I mean it was something that was passed. A. That was passed, yes, so far as that particular case is concerned, and the decision, that was concluded. There was nothing further to be done in that case.

Q. That is as far as you know? A. Well, I know it as a fact, there was nothing further done in that case.

Q. Was there any particular reason for your getting out of the case at any particular time? A. No, I don't see any reason.

Q. I mean after the Supreme Court decision had come down, if there was any subsequent proceeding in the case, would you have been advised so that you could confer with them? A. I think so.

Q. Were you advised of any subsequent proceedings? A. I don't recall whether I was or not as to that.

Q. I think you said a minute ago that you did not know whether there was any other proceeding. A. I don't know whether there was any particular proceeding. I may have asked if there is a rehearing in the Supreme Court, I can't recall now.

Q. But you never conferred about it with anybody after the Third Circuit Court of Appeals' opinion was handed down? A. I may have talked with him about it, but generally.

Q. Did you talk to them about a present proceeding before a court at the time you talked about something that happened in the past? A. What is that?

Q. At the time you had conference after the opinion was rendered by the Third Circuit Court of Appeals did you talk with the attorneys or with Mr. Halle anything about a present proceeding in the Root case, or about a past proceeding? I am trying to find out what you know about this Root case. A. I am telling you exactly what I know. I don't recall anything further. There might have been a petition for a rehearing.

Q. But you did not confer on it? A. No.

Q. Did you have any particular reason for asking for the check from the Universal Oil Company when you did? A. No, I did not ask for the check, I just came over to discuss my fees.

Q. Do you know what you did with the check? A. Yes, I deposited it in the bank.

Q. How much money did you have at that time in your different banks, do you know offhand? A. I must have had $50,000 or $60,000.

Q. You said you had money in safe deposit boxes? A. I used to have.

Q. About how much did you keep in your safe deposit boxes during this period? A. That was an accumulation of years, and then I took it all out some time, I think when the market broke they asked for——

Q. When was this? A. I don't recall, I think it was 1937; 1935 or 1937 the market broke and they wanted a very substantial margin, and I realized that cash was not bringing me in anything and decided instead of keeping it on hand to pay them off, and I paid it out.

Q. How long an accumulation? From what period? A. For years, ever since I started in the practice of law, practically.

Q. The first time you realized the money was not bringing you in anything was 1937? A. Oh, no, I realized the day I put money in it was not bringing me anything.

Q. About how much of this did you have there in 1937 when you took it out? A. Around $60,000.

Q. In what safe deposit box did you have this money? A. I am sure it was ultimately in the Chemical Safe Deposit Company in the City of New York. My record will show the entire transaction."

The witness then said that he used the cash to pay off certain accounts at a stock broker's office, and proceeded at page 843 as follows:

"Q. The Crew Levick case, when was the first time you were approached with respect to the case? I believe that was the time you said you came over

to discuss, or some time after you came over to discuss your fee in the Root case. A. I can't say exactly what date that was, whether it was before or after, but if I could have my files I could tell you about when we started this thing.

Q. Before giving you the file would there be some papers in the file that would indicate about the time you started the case? A. Must have been before December 11th.

Q. 1935. A. Yes, because Judge Haight writes me to the effect that I think you have been advised that the Universal Oil Products Company proposes to bring an infringement suit against Crew Levick Corporation of Pennsylvania, a wholly-owned subsidiary of Cities Service."

The witness then said that he conferred on the Crew Levick case, and was asked certain questions as to what he had done. His testimony was rather vague as to what his services consisted of. He was unable to produce any correspondence.

He said that he assisted in determining the policy of the case. He then testified at 846:

"Q. Are you attorney for the Universal Oil Company now in Pennsylvania? A. I am in this case (Crew Levick case).

Q. In any other case? A. No.

Q. Are you general counsel for them? A. I don't know whether you call it general counsel; I am counsel for them.

Q. Does the retainer include work on any other case? A. Whatever work they need they can call on me.

Q. That is the understanding? A. It is.

Q. Do you have any letters setting forth that understanding? A. I don't think so unless there are letters in there.

Q. You are attorney of record in this particular case? A. I am.

Q. How much have you received with respect to this particular case so far? A. You mean with reference to Crew Levick?

Q. Yes. A. I received a retainer for the year 1936 of $10,000, and I received a retainer for 1937 of $10,000.

Q. Didn't you receive an additional fee of $5,000? A. Yes, that was $5,000 I received in March, I think, or April, whatever my books show."

The witness produced a few letters concerning rather unimportant things in connection with this case, such as getting extensions of time, and so forth. The witness said he had no other matters for Universal except these two, page 849.

The witness again said on page 850 that he was advised not to take any other oil cases except the Root case. He said he shared the fee in the Root case with his brother, and it would be shown on their income tax returns, page 850.

At pages 863 and 864 the witness denied with much emphasis that he ever discussed the Stokley loan with Judge Davis in any way whatever.

The witness was taken over certain of the details of the Stokley loan again, but nothing new developed, although he was in Florida he said he did not make any inquiries about the loan or his security.

On page 855 the witness testified:

"Q. You were not called upon to do any work in the Root case? A. I wouldn't say that. Whatever work was necessary I did. When they called upon me to do anything, I did it.

Q. What did they call upon you to do? A. I outlined it yesterday.

Q. Please tell me again exactly what they called upon you to do in the Root case. A. In the first place, they did not want me to take any other case of any other oil company.

Q. They did not want you to take any other case of any other oil company, and that is what stands out in your mind? A. No, it doesn't stand out in my mind. You have asked me for certain particulars, and I am trying to give them to you, the best I know how.

Q. That is number one; go ahead. A. Well, I had conference with Judge Haight numerous times.

Q. Anyone else? A. I had conference with the president of the company.

Q. Numerous times with the president of the company? A. No.

Q. Who is he? Mr. Halle? A. Mr. Halle.

Q. How many conferences did you have with Mr. Halle? A. Well, on the legal conference he had one whole afternoon over there.

Q. Who was present at that time? A. I think Judge Haight, Mr. Halle, and Mr. Behrens; I think Mr. Thomas was there. I forget who else was, there may be someone else.

Q. Any other attorney with whom you had a conference aside of the ones you mentioned with Mr. Haight? A. There may have been at the time, I can't recall just at this time.

Q. Well, it was a pretty important case to the Universal Oil Company. A. Very important.

Q. And you got $25,000 for your participation in it, didn't you? A. Yes, sir.

Q. And can you give us any idea of what you did or what you added to the picture? A. I don't think I added anything except that I was retained generally. The case involved many millions of dollars, and I was retained 3½ years, and I thought I was entitled to it.

Q. And principally for staying out of the case on anyone else's side? A. Well, I suggested my fee, and they paid it, that is all.

Q. Why was it Mr. Belknap came to you? A. You will have to ask Mr. Belknap.

Q. What did he say to you when he came to you the first time? A. Well, he said this to me——

Q. You know Mr. Belknap is dead? A. I told you that yesterday.

Q. Well, how can I ask Mr. Belknap? A. Well, I say I don't know. You asked me why he came to me. I did not ask him why he came to me. I did not solicit this case, I can assure you. I never solicit a case.

Q. Nobody says you have. A. Well, you are suggesting what did he say.

Q. You are protesting very much. A. I am not protesting. You are suggesting that I solicited the case. I never asked this man why he came to me.

Q. Will you kindly answer the question? A. What is the question?

Q. What did Mr. Belknap say to you about his reason for coming to you in this case? A. He did not give me any particular reason why he came to see me. He told me that he had, they had a very important case in the District Court, Delaware District, before Judge Nields.

Q. And had the case been decided yet? A. No, the case had just begun. I think they were about ready to take evidence or had taken evidence, I can't recall.

Q. To what do you attribute Mr. Belknap coming to you in this case? A. I haven't the slightest idea.

Q. Would you feel that you were specially qualified to handle this particular type of case? A. I couldn't say that. I will leave that to the judgment

of other people when they come to me, or other lawyers.

Q. Was there anything that you did in this particular case that some other attorney could not have done? A. I don't believe there was.

Q. Was there anything that you did in this particular case that some attorney didn't have to do? A. I told you what I did, and most any lawyer would have done what I did in this case.

Q. The only papers you have in your file in this case are a record of the opinion of Judge Nields, isn't that right? A. Whatever I brought here.

Q. That is all you brought wasn't it? A. I think so.

Q. Did you ever have any other papers in this case? A. I suppose I had some papers, but they did not amount to anything except records which I filed which you can see in the clerk's office.

Q. In the Crew Levick case you have got a lot of correspondence, haven't you? A. Yes, sir.

Q. Papers sent back and forth between you and the attorneys? A. That is correct.

Q. You have no such correspondence in the Universal Oil Case, have you? A. No.

Q. Did you ever have such correspondence in the Universal Oil Case? A. No.

Q. Had you at this time in 1932 had any patent cases? I think you said yesterday you had none. A. Whatever the date was, I don't recall whether I was interested in the Tri-Ergon case or not.

Q. From any other source either from Mr. Belknap or from Mr. Halle, or from any of the attorneys in the case, did you ever find out why it was that Mr. Belknap came to you specifically and asked you not to lend your services to any other oil company? A. I don't know.

Q. Because you usually have with respect to cases? A. No, I never had such a request before.

Q. You felt that in that particular case your services were worth $10,000 a year, is that right? A. I felt that the amount of money that was involved and the size of the litigation with the millions that were involved in that case, that $10,000 a year for being retained in the case was nothing unusual. There are a lot of lawyers that get $10,000 and $50,000 a year. I know a lawyer that got a million dollars for three months work; a client of mine paid it, one million dollars. I will give you the name and the facts about it if you like."

Page 889:

"Q. Did it ever occur to you why it was that they wanted you in this case? A. It never occurred to me, and I never asked any questions.

Q. Did you ever discuss this case with Judge Davis? A. Never. He never knew I was in this case, so far as I know.

Q. And to what do you attribute the cutting down of your request of $35,000 to $25,000? To the lack of value of your services, or just horse trading? A. No, he just made the suggestion at $25,000, that is all there was to it."

EXTRACTS FROM TESTIMONY OF J. WARREN DAVIS BEFORE THE GRAND JURY, NEW YORK, IN THE CASE OF THE UNITED STATES VS. JOHN DOE; APRIL 23, 1940.

The witness testified that total fees he had received since he was on the Bench from outside sources, namely, executor's fees would be about $7,900 or $8,000, page 5.

He had bank accounts in Broad Street National Bank of Trenton, N. J.; Trenton Trust Company, Trenton, N. J.; Salem National Bank & Trust Company; Savings Account, Philadelphia Savings Fund Society; small balance in Swedesboro Trust Company; that was probably closed out, page 6.

At page 26 the witness said he had a safe deposit box in the Broad Street National Bank, and Mrs. Davis had one in the Philadelphia Savings Fund Society. He also said he had a box which he kept under lock and key in his office in which he kept some cash.

Regarding the Stokley loan, Judge Davis testified at pages 121, et seq.

> "Q. Now, Judge, let me ask you with respect to the—I want to ask you a question or two with respect to the $4,000 loan which you made to Stokley. A. Yes.
>
> Q. Now, you borrowed that $4,000 from Samuel Ungerleider, is that correct? A. Yes, that is right.
>
> Q. And that occurred in the early part of 1936, Judge? A. Yes, just the date I don't recall, but somewheres in the early part.
>
> Q. Early part of 1936? A. Yes, sir.
>
> Q. And that was a few months after Morgan Kaufman had loaned Stokley $10,000, is that correct? A. Well, whatever time the records set forth.
>
> Q. Well, now, do you recall, Judge, that Morgan Kaufman's loan was made in the end of 1935? A. I think you said yesterday that it was made either the latter part of October or the first part of November.
>
> Q. Of 1935? A. There would have been two months in that year if it was November, and the other months in the next year, whatever time I made that loan.
>
> Q. Now, Judge, I want to ask you here the same question I asked you in our conference the other day,

and that is what was the reason for the difference between these two transactions, that is, why was it that in the Kaufman, Stokley transaction you brought—you put Stokley in touch with a prospective lender? A. Yes.

Q. Whereas in the Ungerleider to you to Stokley transaction you imposed yourself between Stokley, the ultimate recipient of the money, and Ungerleider, the ultimate lender? What is the reason for the difference between these two transactions? A. There is no particular reason I can give you other than this, I doubted that Mr. Kaufman would put any more money down there in the Stokley property. I did not know anybody else that I felt like going to and asking to put money in the Stokley property. I thought it was perfectly safe to do that, and still think so, and I wanted to help Mr. Stokley to save his properties, and it has always, Mr. Correa, from my earliest time of life until now been to help people when I can. I have frequently gone into my chambers in these troublous times having read my mail until one o'clock, people coming in to get me to help them, to see if I could get them employment, to devise some way; and that has been the philosophy of my life for the whole period of my life.

I suppose because I was born on the farm and was a poor boy, came up to school and worked my way through that I have doubly sympathized with young men and young women who are struggling for an education and do not have the means to do it. I can name at least a dozen boys that I have helped and brought up to college, and now they are college graduates, and some of them doing well; and perhaps three or four times that many I have secured scholarships around, and that has been my philosophy, and that is why I helped Stokley and the reason why I have many.

I thought Mr. Ungerleider would lend me the money, as he did, but I doubted that he would lend it to Stokley.

Q. Don't you think if you had asked Samuel Ungerleider to loan money to Stokley, he would have? A. I think he would have loaned it to me much more quickly and much more willingly than he would have to Stokley.

Q. As a matter of fact, between you and Stokley who was the better credit risk? A. Well, I do not know. We were both a credit risk, if I did it the way it was done, otherwise Stokley, alone, would have been a credit risk.

Q. Stokley had no obligation to Ungerleider? A. No, he had no obligation, but he had an obligation to me, and I had an obligation to Sam Ungerleider, and if Stokley did not pay, I would have to, and so there was kind of a double-barreled arrangement there.

Q. Were you able to pay at this time? A. No, I was not.

Q. Did Sam Ungerleider know that? A. I think Sam Ungerleider knew our circumstances.

Q. You were over-extended at your banks at this time, were you not? A. Yes, I was.

Q. And in a substantial amount? A. Yes, that's right.

Q. And Sam Ungerleider knew this? A. I think Sam Ungerleider knew that in a general way. I doubt that he knew it in a detailed way until the following year. In doing what I did for Stokley I did not then think and do not now think that I was breaking any custom."

And then at page 125:—

"Q. Did Stokley give you security? A. Yes.

Q. What security? A. He conveyed the land to me.

Q. Did he give you additional—— A. And about that land you want those two letters.

Q. That is correct. A. Did he give me security?

Q. Yes. A Yes.

Q. What, Judge? A. He gave me a ring that he said he paid $3,500 for, which Mrs. Davis now has in the safe deposit box.

Q. He advanced the $4,000 to Stokley, or, rather, to his creditors, is that correct. A. Yes."

After some further details about the rate of interest on the loan, Judge Davis testified as follows:

"Q. Stokley made payments on that loan? A. Yes, that is correct. That is what I wanted to correct in my statement yesterday. I told you that I thought yesterday that no one had paid me any money in 1936, in 1937, in 1938, and that is the vice of testifying from memory about something that you have been asked about.

Now Stokley paid me in 1936, I think it was $400; that was on the note; in 1937, $1,500 or $1,600; and in 1938, $400."

He denied that he knew whether Stokley was paying anything to Kaufman. Judge Davis' account of the circumstances under which the Kaufman loan was made substantially agrees with the testimony of Kaufman. See page 128.

When Stokley made payments to Davis, he did not turn them over to Ungerleider, saying he was in trouble and needed the money, page 132.

Judge Davis' testimony is concerned almost altogether with his financial transactions and various matters but without any mention of the Universal Oil Company case. I have given about all that has any materiality regarding the Stokley loan.

EXHIBIT 14

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5648, 5546

ROOT REFINING COMPANY,

Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,

Plaintiff-Appellee.

Report of Thomas Raeburn White, Master, Sur Order of Reference of November 26, 1941

This case is a consolidation of two cases begun in 1929 and 1931, respectively, in the United States District Court for the District of Delaware by Universal Oil Products Company (hereinafter referred to as "Universal") v. Winkler Koch Engineering Company, and Root Refining Company.

The plaintiff charged that certain process patents owned by it had been infringed, demanding an injunction and an accounting.

The consolidated case was so proceeded with that on April 29, 1934, a decree was made in favor of the plaintiff,

the court finding that the two patents relied upon were valid and infringed. Appeals were taken to this court on July 12, 1934, were argued on January 7, 1935, before Judges Buffington, Davis and Thompson, and were decided on June 26, 1935, in one opinion which was filed by Judge Davis affirming the decree of the court below. A petition for rehearing was filed but denied on August 6, 1935. On September 3, 1935, a petition for a writ of certiorari was filed and was denied by the Supreme Court on October 21, 1935. The litigation was afterwards settled by the parties. The consolidated case is hereinafter referred to as the "Root" case.

Universal was engaged in the licensing of patented processes for the cracking and refining of petroleum; its license fees ran into very large sums and if the patents in question had been declared invalid or not infringed, the effect on Universal's business would have been very serious. It had suits pending against other refiners in different parts of the country and was engaged in a vigorous effort to establish the validity of its patents in order to maintain its licensing system.

On June 20, 1941, certain counsel who had represented the Root Refining Company in the above mentioned litigation, Hon. Arthur C. Denison, of Cleveland, Ohio, J. Bernhard Thiess, Esq., and Thorley Von Holst, Esq., of Chicago, Illinois, filed a petition with this court as *amici curiæ* averring certain facts which they contended should cause this court to investigate its decision in the Root case to ascertain whether there had been any fraud in connection with it. Although the case had been settled, the decision was used as a precedent and in some cases was claimed to be *res judicata* on the ground that other companies had participated in its defense.

An answer to this petition was filed by Universal; the matter was argued before this court and an order made on November 26, 1941, appointing the undersigned Master "with authority to examine, investigate and to make and report to this court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman, and former Circuit Judge J. Warren Davis, and any and all persons acting for or on behalf of any of them in connection with the above entitled causes and the entire subject matter of the prosecution and disposition of the said causes, and in particular whether there was in connection therewith such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by this court in the above entitled causes on June 26, 1935."

This court also, by the same order, directed the Master to investigate the records, documents and other evidence which had been developed by the Department of Justice in connection with the investigation of the conduct of Judge Davis and his prosecution, together with the said Morgan S. Kaufman, for obstruction of justice in two cases tried in the United States District Court for the Eastern District of Pennsylvania, including Grand Jury proceedings in New York and Philadelphia, and gave the Master appropriate power to issue subpœnas and to take testimony in any judicial district of the United States for the purposes aforesaid.

Pursuant to the direction of the court, I examined the records, documents and other evidence in the possession of the Department of Justice, the proceedings before the Grand Juries in New York and Philadelphia, the record

of the two trials above noted and took testimony at twenty-two hearings, one of which was held in Chicago and the others in Philadelphia. 4479 pages of testimony were taken and transcribed, and 288 exhibits were admitted in evidence, all of which I file herewith together with transcripts from certain proceedings before the Grand Jury in New York admitted to be correct (Record 42, 65). The pleadings and briefs in the Root case were also by reference made a part of this record. The hearings were attended by the above named *Amici Curiæ* until the death of Judge Denison, which occurred on May 27, 1942, and thereafter by the surviving *Amici Curiæ* (hereinafter referred to as *Amici*), and by counsel for Universal. I have been greatly assisted by the thorough and intelligent presentation of the matter by counsel on both sides and by able and extensive briefs which have been filed with me, the last one being received on August 21, 1943.

Many objections to the testimony were made, upon some of which I reserved judgment. I now sustain the objection to the testimony relating to the business of the Martz Bus Line (R. 2537-2550) and the circumstances under which an order was made in reference thereto by Judge Johnson as being immaterial to the present investigation. I also sustain the objection to the testimony beginning on page 3738 of the record relating to remarks made by Judge Davis to one of his fellow judges as too remote from the issues now under consideration. For the same reason I sustain the objection to the testimony relating to the Mifflin Chemical Company case (R. 3745-3750). Other rulings will be referred to later.

Amici and counsel for Universal have submitted to me numerous requests for findings of fact and conclusions

of law which go more into detail than may appear to be necessary, but in order that a reviewing court may have before it all of the facts which counsel deem relevant, I have concluded to answer all their requests. These requests and my answers are included herein as a part of my report, page 33. Any statements of fact or conclusions of law contained in the body of my report, if not fully covered by the answers to requests, may be considered to be findings and conclusions.

The facts from which it is claimed the inference may be drawn that the decision in the Root case was tainted with fraud sufficiently appear from the following recital and discussion.

At some time during the progress of the Root case, Morgan S. Kaufman, a lawyer who practiced in Scranton, Pennsylvania, was retained by Universal. Kaufman for some years had been a referee in bankruptcy and had appeared in a number of cases in the Pennsylvania and Federal courts, but he had no knowledge of patent law and was not an outstanding lawyer. He was, however, an intimate friend of Judge Davis, then a member of this court.

When Kaufman was retained is not satisfactorily disclosed by the testimony. It is contended by Universal that he was retained by one of counsel for Universal, now deceased, Frank L. Belknap, Esq., in the spring of 1932, and that Belknap at that time agreed with Kaufman that he was to accept no other retainer from oil companies and was to hold himself available for services for which he would be well paid.

Amici contend that Kaufman was not retained at that time but much later, after the Root case was in this court—possibly after the case had been argued. Amici point to the

fact that there is no documentary evidence that Kaufman was connected with the case or with Universal until April 15, 1935, when there is an entry in the diary of Halle, president of Universal, indicating that Kaufman called on him on that date in company with one of his other counsel, the late Judge Haight (R. 560).

There were a number of counsel for Universal who were active in the litigation. Some of them had never heard of Kaufman's connection with the case until 1935 or even later, while others were very guarded in their statements. The leading trial counsel in the Root case, Judge Haight (now deceased), made a statement to the Assistant United States Attorney during the investigation of the conduct of Judge Davis, which by agreement was placed on this record. Being asked whether Kaufman had been retained, he replied: "I can only give you that by hearsay, and taking it on that basis I say yes". (R. 653). Other counsel were similarly careful in their statements. None of them knew except by hearsay when Kaufman was retained.

Amici introduced Mr. Belknap's diaries, from which it appears that the date now fixed by Kaufman as the date when he met Mr. Belknap in the Bellevue-Stratford Hotel, Philadelphia, and was retained by him cannot be correct, for at that time Mr. Belknap was in California recovering from an illness (R. 260-261). Kaufman's name did not appear among Mr. Belknap's diary entries (R. 260, 279). Kaufman's statements regarding the date of his retainer were not altogether consistent. In his testimony before the Grand Jury, in New York, he testified that at the time he was retained he thought Belknap informed him that testimony was then being taken in the Root case (R. 1691). As

the trial in that case did not begin until June 21, 1932 (R. 1478), this would put the date of the interview later than June 21st. In the proceedings before me Kaufman testified that he had been misunderstood and that his "best guess" was that the interview with Belknap was in March or April (R. 1678). He never appeared in the Root case at any stage; his name did not appear on any briefs, records or memoranda used in the case.

I have carefully considered all of the testimony with reference to this matter and I have come to the conclusion that there is nothing in the record upon which I can base a finding as to the date when Kaufman was retained. The date is important only as bearing upon the question whether the length of time during which Kaufman was under retainer would explain the compensation paid him.

The evidence is in conflict as to what, if any, legal services Kaufman performed in the Root case. Kaufman, testifying before the Grand Jury in New York, said that when briefs were drafted either at the Universal office or at Judge Haight's office, "copies would come back to me, and I would redraft them or send them back in such form as I thought would be necessary, or go over there and straighten the thing out." (Excerpts from Proceedings before the Grand Jury, New York, filed herewith, p. 56.) He also said that he spent one afternoon in conference with counsel at the offices of Universal Oil Company prior to the argument of the appeal (Id. 62-63). He again said (Id. 64) that he had been sent "rough copies" of the briefs for his criticism. In these proceedings Kaufman testified that he discussed the Root case with Judge Haight (R. 1705), but he did not remember the substance of the discussion (R. 1707). He further testified (R. 1708):

"Q. Have you any recollection as to the subject matter of the conversation when you saw him at those times?

"A. About the character of the case and the progress of the case. He was a great fellow to sit down and show me the—how this apparatus was working and all that sort of thing, great fellow to draw outlines and show me the importance of how the Dubbs patent—I think it was an improvement on some old patent—that they had, and how some Eugoff—

By MR. HARRIS:

"Q. Egloff?

"A. Egloff, that is right, is even an improvement on that, and all that line. We had spent many very pleasant hours consulting, that is, discussing this matter."

On the other hand, Judge Haight's statement to the United States Attorney referring to Kaufman's services was as follows (R. 654-655):

"A. I never asked him to do anything. When we were preparing the brief here in New York, I called him over and told him we thought it inadvisable to put his name on the brief, because I knew from what had been told me once down there that a resettlement had occurred when someone was put in a brief that wasn't in the lower court and wasn't a patent lawyer, and I was afraid of the effect it would have on Judge Buffington particularly, because his brother was a pretty warm friend of Judge Buffington's. He agreed with that.

"Q. He did no work with respect to the brief?

"A. No, it would have been useless to have him do work with respect to the brief. We were pressed for time.

"Q. As far as active participation and preparation of the brief or the case in any way, he did nothing?

"A. That's right."

Judge Morris' testimony was to the same effect (R. 227).

It is not now claimed by Universal that Kaufman performed legal services in connection with the Root case to any substantial extent and I find that he performed none.

The record, however, discloses that he was paid, admittedly for services in the Root case, $25,000 on October 22, 1935 (R. 389-392) and $5,000 on July 27, 1936 (R. 1805-1807). He was also paid during the year 1936 $20,000 additional, making a total of $50,000. The two payments of $10,000 which were made to him on March 18, 1936, and December 2, 1936, were said to be retainers for the years 1936 and 1937, during which it is alleged he was expected to render services in other cases which were pending or about to be begun. The testimony, however, has convinced me that Kaufman would not have been paid these "retainers" except for his services in the Root case, and that the agreement to pay the retainers was entered into as a part of the transaction whereby he was compensated for whatever services he had performed in the Root case.

Halle testified that in September, 1935, Kaufman asked him for $35,000, allegedly compensation for a retainer for three and one-half years at $10,000 a year; that he objected to the amount requested and after some discussion he agreed

to pay Kaufman $25,000, in view of a continuing "arrangement" with him involving a further retainer of $10,000 a year. (R. 517, 590-593, 599-600, 640-641). He said that Kaufman made no objection to this arrangement and accordingly he was paid $25,000 on October 22, 1935. Subsequently, when the final payment of $10,000 was made, Halle requested information as to the amount which Kaufman had been paid and had before him a memorandum made up by his bookkeeper showing that altogether, with the payment about to be made, Kaufman would have received $50,000. (Amici Ex. 37, R. 834.) If the only question then before Halle was whether Kaufman was entitled to a $10,000 retainer for the ensuing year, the question as to how much he had been paid for the Root case seems immaterial. Mr. Halle made it clear that when this last payment was made, the obligation to Kaufman was ended so far as he was concerned (R. 543, 567, 624).

There is no credible evidence from which I can find what the arrangement made with Kaufman was at the time he was retained. The only evidence on this point is from Kaufman himself, all other statements regarding it being merely hearsay. His testimony is that he was retained in March or April of 1932 (a date which is certainly incorrect), and that while no definite arrangement was made with him at the time, he was promised that he would be well compensated with the suggestion that he would fare better if he waited until the case was over, and with the understanding that he was to accept no other retainer from oil companies. The theory which Universal has presented in these proceedings is that Kaufman was retained at or about the time stated by him; that he was paid at the rate of approximately $7,000 a year for three and one-half

years, $5,000 additional because another case had been profitably settled on account of the decision in the Root case, $10,000 as a retainer for the year 1936 and $10,000 as a retainer for the year 1937, both sums, however, being paid in the year 1936.

The real question involved here is whether the arrangement with Kaufman was a retainer in the normal sense or an agreement to pay him a fee in the event of success in the Root case. The facts developed by the testimony, including Kaufman's recital of his conversation with Belknap, point to the conclusion that the arrangement with Kaufman was that he was to be paid a substantial fee if the Root case was ultimately decided in favor of Universal. If he had been retained on a "hold off" basis as claimed, a fee would have been due him whether or not the Root case was successfully terminated, and in the normal course of events such retainer would have been paid currently. It is admitted that Kaufman received nothing at all until after the Supreme Court had finally denied the petition for certiorari in the Root case, and that he was paid $25,000 on the day after the certiorari was denied. The voucher directing the issuance of the check to Kaufman is dated October 18, 1935, and reads that the payment was to be made "on account of legal services to date in connection with the Root-Winkler Koch case and pending matters" (R. 384). The check was dated October 18, 1935 (R. 390), but it was not delivered until October 22nd, certiorari having been denied on October 21st.

Universal contends that the delay in delivering the check to Kaufman was merely accidental, due to delays in its accounting department, but this is not in accordance with the testimony of Kaufman himself (R. 1755-1757, 1765). He testified as follows:

"Q. And am I correct in saying that your payment was delayed until that decision was to come down?

"A. Well, I don't know whether you would say the word 'delay', but it was not to be given to me. I asked for it beforehand, but it was not delivered to me until the decision was handed down. That is correct" (R. 1765).

It will be noted that Kaufman in his answer not only said that the check was not actually delivered to him until the Supreme Court had denied the certiorari, but that it was *"not to be given"* to him until the denial had occurred. This appears to be a plain recognition that the $25,000 payment was contingent upon final success in the Root case. It is conceded that Kaufman never asked for any money until after the decision by this court, and, as above indicated, he was put off until after the Supreme Court had acted upon the petition for certiorari.

I conclude that there was an agreement or understanding between Universal and Kaufman that he was to be paid a substantial fee if and when the Root case was finally decided favorably to Universal. The question then arises: what service was he expected to perform in return for this fee? As to this, there is substantially no evidence. Mr. Halle's testimony on this point was vague and unsatisfactory (R. 638-645). There was no need for local counsel in Pennsylvania and Kaufman was not asked to assist in the trial or argument of the case.

What Kaufman was to do in return for the money he was to receive, and did receive, can only be inferred from what he did. Immediately after he had received the $25,000 payment, he was requested by Judge Davis to meet him in

his chambers, together with a man named Charles L. Stokley, said to be a distant cousin of Davis', who lived at Mount Dora, Florida. This meeting took place on October 24, 1935, two days after Kaufman had received his check (R. 2355, 2356). The interview which then took place was described at some length by Judge Davis, by Mr. Kaufman and by Mr. Lord, Judge Davis' secretary. The substance of the interview was that Kaufman agreed to loan $10,000 to Stokley on the security of certain property most of which Stokley had formerly owned, but title to which he had lost (subject to redemption) to the Town of Mount Dora by reason of inability to pay paving liens assessed against it.

A contract covering the details of the loan was then drawn up with the assistance of Mr. Lord, Davis' secretary, and Miss Kleish, his stenographer; subsequently, after certain matters which afterwards arose were adjusted, Kaufman drew his check for $10,000 to the order of B. F. Lord, attorney, against a bank account in which he had deposited the $25,000 check received from Universal and in which account he had not enough other money to meet the check. Lord took this check to Florida, used it to redeem Stokley's property from the Town of Mt. Dora, secured from the town and from Stokley and his wife papers vesting title to the property agreed upon as security in Kaufman, recorded these papers and sent them to Kaufman, together with a policy of title insurance. A revised contract dated November 25, 1935, was signed setting forth the terms of the transaction providing for the repayment of the $10,000 to Kaufman with interest at the rate of 8% per annum and that the properties would be reconveyed to Stokley upon repayment of the loan with interest (R. 1596).

There are two questions concerning this transaction about which much of the evidence has revolved.

The first question is whether it was a legitimate business transaction entered into by Kaufman as an investment or was merely a device to benefit Davis with intent to influence his judicial action or in compensation therefor.

The second question is whether the loan was made as compensation to Davis for his favorable decision in the Root case.

I have no difficulty in finding that the loan was not a *bona fide* business transaction entered into for profit by Kaufman, but that it was made as a favor to Judge Davis in response to a request from him. Although Kaufman apparently dictated the agreement between himself and Stokley in the first instance, or at least was present when it was dictated by Davis' secretary, Mr. Lord, Kaufman gave little or no attention to the matter from that time forward except to issue his check when he was requested to do so. All the details with reference to the loan and the security therefor were attended to by Judge Davis and Mr. Stokley; Kaufman, so far as appears, was not even informed of the various steps taken in connection with the matter. He had no information except statements made to him by Stokley and Davis with regard to the value of the land received as security which he has never seen (R. 1933). He testified that he relied upon Lord as his attorney to see to it that the proper conveyances were made and the title checked (R. 1887, 1894-95, 1927), but Lord said that he was a mere messenger acting at the request of Judge Davis; that he did not act as attorney for Kaufman and was paid no fee (R. 1574-1576).

Kaufman was aware of the fact that Stokley had lost title to his property because he had been unable to pay paving liens which had been assessed against it, and it was a reasonable inference that Stokley would not make application to him for a loan unless he had failed to get it from sources in Mount Dora or its vicinity. The transaction bears no resemblance to a *bona fide* investment.

As bearing upon the question whether this loan was a *bona fide* investment or was intended to benefit Judge Davis for some fraudulent purpose, I admitted in evidence testimony relating to another transaction (hereinafter referred to as the Fox transaction) involving Davis and Kaufman, which began the same year during which payments were being made on the Stokley loan. Counsel for Universal objected to the admission of this evidence, but I admitted it on the theory that where the question at issue is the intent or purpose with which an act is done, a similar act at or near the same time involving the same persons may be shown in order to throw light upon the intention of the parties. Particularly is this rule applicable, I think, where an act apparently innocent on its face is charged to have been done with a fraudulent intent, and a similar act at or near the same time, done by the same persons, is shown to have been done with such intent. The following authorities, I believe, sustain this ruling: *Wood* v. *United States*, 16 Peters 342; *Commonwealth* v. *Mezick et al.*, 147 Pa. Superior Ct. 410, 24 A. 2d 762; *Commonwealth* v. *Bell*, 288 Pa. 29, 135 A. 645; *State* v. *Williams*, 136 Mo. 293, 38 S. W. 75; *National Labor Relations Board* v. *National Seal Corporation*, 127 F. (2d) 776; Wigmore on Evidence § 302 and § 343.

Many of the facts regarding the Fox transaction were brought out in the criminal trials to which reference has

been made, and in disciplinary proceedings against Kaufman who has now been disbarred. They are briefly as follows:

William Fox, who had large investments in the moving picture industry, became heavily involved and on May 29, 1936, filed a voluntary petition in bankruptcy in the United States District Court for the District of New Jersey (R. 2855, 3466). Kaufman had represented Fox in a previous matter (R. 1673-77) and was a friend of his, although there is no evidence that he represented Fox professionally in the proceedings about to be referred to. Fox, however, had advised him of his impending bankruptcy (R. 3468) and Kaufman kept in touch with the proceedings (R. 3489). Kaufman introduced Fox to Judge Davis about the time his bankruptcy petition was filed (R. 2457, 3469, 3470). Upon the occasion of this meeting Fox introduced the subject of his bankruptcy proceeding (R. 3470, 3471), recited his "troubles" to Judge Davis, and inquired whether Davis and Kaufman knew the referee before whom the proceedings would take place. Davis and Kaufman said that they did not know who the referee was, but if they found out they would try to see that a certain procedure, which Fox preferred, would be carried out (R. 3472-3473). Kaufman and Judge Davis did call on the referee in bankruptcy, Robert E. Steedle, Esq. (R. 2012-13, 2456-57); Judge Davis invited him and Mrs. Steedle to dinner (R. 2467, 2469, 3016) and to his daughter's wedding which took place that summer (R. 2469, 3017), although he had never previously known him. Davis also took Steedle fishing twice in a borrowed boat (R. 2459-2461) and suggested to Steedle that he might be advanced to a judgeship (R. 2463-2464). Kaufman also called upon Steedle at least twice

(R. 3655, 3680) and Judge Davis telephoned several times (R. 3031).

Mr. Steedle is now deceased. I admitted in evidence a memorandum made by him, in which he recorded a number of incidents in which Kaufman and Judge Davis were involved, which he evidently thought were intended to influence him improperly in the discharge of his duties as referee in bankruptcy in the Fox case. My reasons for admitting this document are fully stated in a memorandum opinion which I gave to counsel at the time and which is attached hereto as part of this report p. 83. Since that opinion was filed, one of the cases which was discussed in it has been before the Supreme Court of the United States (*Palmer et al.* v. *Hoffman*, 318 U. S. 109), and counsel for Universal argue that the opinion of the court in that case should change my opinion as to the admissibility of the memorandum. There is some language in the opinion of the Supreme Court which seems to afford basis for their argument. I think that case distinguishable and that the memorandum was properly admitted, but as the statements contained in it are not necessary to a decision and are merely corroborative of evidence given by other witnesses, I have not considered them in arriving at my decision and now grant the motion to strike the Steedle memorandum from the record. I have also excluded from consideration and grant the motions to strike exclamations or remarks made by Mr. Steedle, in one instance when called on the telephone by Judge Davis (R. 3031) and in another at the conclusion of one of Mr. Kaufman's visits (R. 3679).

There is no doubt, however, as shown by other evidence, that Kaufman and Judge Davis displayed an un-

usual interest in Steedle from and after the time when the Fox bankruptcy petition was filed.

In July of 1936 Kaufman visited Fox in Atlantic City and told him that Judge Davis was in need of $15,000 to pay the wedding expenses of his daughter, and requested a loan to Davis in that amount (R. 3475). Fox obtained the money, allegedly by borrowing it from his wife, and delivered it to Kaufman, who, in turn, gave it to Davis (R. 3475-3480). Subsequently, Davis solicited another loan in the amount of $12,500 from Fox, which Fox made him largely in $1,000 bills (R. 3481-3484). These "loans" have not been repaid.

It is argued that the testimony as to this second loan at least should be excluded on the ground that Kaufman was not directly concerned in it. However, it is corroborative of the fact that Davis had obtained the $15,000 loan through Kaufman as it shows his willingness to accept favors from Fox while his cases were pending or about to be appealed to the court on which Davis sat.

There are other facts which bear on this question. Fox testified in the second criminal trial that on Sunday evening, March 16, 1941, Morgan Kaufman came to the home of Fox's attorney, Becker, while Fox was conferring with Becker and told Fox that Judge Davis wanted to see him. He advised Fox to "secure a room at the Pennsylvania Hotel under the name of Herman Goldberg" (R. 3498) for the interview. Becker relayed this advice to Judge Davis and Davis registered under that name (R. 2525, 2526) at another hotel. At a conference between Davis and Fox which took place at this hotel the next day, March 17, 1941, Davis expressed to Fox his alarm over the fact that the Government had traced the $1,000 bills which Fox had de-

livered to Davis and requested him to say that he had given these bills to a man named Lewis, then deceased, from whom Davis would say he had subsequently received them in payment of a loan (R. 3496). Fox refused to make such a statement as he said it was not the fact and he would not be a party to it (R. 3497). Davis did subsequently attempt to explain his having had possession of the $1,000 bills which the Government had traced by saying that he had gotten them from Lewis, although he made contradictory statements as to the time. Prior to this interview Davis says he "called Mr. Kaufman and told him that the investigation was going on in Philadelphia, not knowing whether or not he had been informed" (R. 2525).

At this time the matter principally under investigation was the $12,500 loan as to which the Government had traced the $1,000 bills; up to that time Fox had denied that such a loan had been made. A few days later, after consulting his attorney, Martin W. Littleton, Esq., he admitted the facts regarding the $12,500 loan and for the first time informed the Government attorneys of the $15,000 loan in which Kaufman was directly involved (R. 3516) and of which they had previously known nothing. In view of these facts, it is impossible to escape the conclusion that Davis and Kaufman were both involved in all of these corrupt proceedings; otherwise there would appear to be no reason for Davis' having turned to Kaufman at a time when he was being investigated concerning a loan with which Kaufman apparently had not been connected and for Kaufman's advice to Davis and Fox to meet in a clandestine manner. These facts I consider to be ample basis for admitting the testimony with regard to the $12,500 loan.

The testimony is clear that subsequently this court decided five separate appeals in the Fox bankruptcy matter

in favor of Fox. Some of these decisions were of an extraordinary character; some were delayed and others unduly advanced, apparently to favor Fox (R. 2839-2970). Judge Davis denied that he wrote the opinions in these cases which were signed by Judge Buffington. I find, however, based on the testimony of Judge Buffington (R. 3556), that Davis did write them. His effort to conceal the fact that he was the author of these opinions is a clear indication that his decisions were influenced by the money favors he had received.

The motive or purpose of the favor granted to Davis through the making of the Stokley loan must be considered in the light of the testimony regarding the Fox transaction, and I find that it was made for the purpose of influencing or compensating Davis for favorable judicial action in cases in which Kaufman was interested.

The question remains whether Davis received or was to receive any financial benefit from this loan, for if not it might well be argued that the mere loaning of money to a relative of a judge is not sufficient reason to find there was any corrupt intent.

Amici contend that the transaction was a mere cover for a loan really made on behalf of Davis; that the loan was to be repaid to Davis or the property ultimately transferred to him, and that he was paid interest on it on several different occasions prior to the beginning of the investigation by the United States Government. On the other hand, Universal, and Davis and Kaufman, deny that Davis had any financial interest in the loan, and that while Kaufman may be criticized for loaning money at the request of Davis, there was no other impropriety in it.

It is undisputed that all the details of this loan were attended to by Judge Davis. The original request for a loan was made to Davis by Stokley in January, 1935 (R. 2652-2655). A number of letters and telegrams passed between Davis and Stokley and Davis and Cooley, attorney for the Town of Mount Dora, between that date and November 25th, when the loan was actually made. These letters and telegrams are in the record (R. 2267-2319). They refer to negotiations with the Town of Mount Dora as to the basis upon which the properties would be reconveyed, the condition of the title, the security to be given, whether title insurance could be obtained and other matters of that character. There is no evidence that Kaufman paid any attention to these negotiations or knew anything about them. Pursuant to arrangements made by Davis the parties met on October 24, 1935, in Davis' judicial chambers and prepared a contract.

Subsequently, it appearing that the property could not be conveyed clear of all encumbrances but must be subject to certain taxes referred to as "county taxes", Davis entered into a vigorous correspondence with Cooley and with Stokley on the subject and ultimately succeeded in obtaining additional security from Stokley to cover the amount of this lien.

Amici contend that the contract between Kaufman and Stokley was revised by Davis to include the additional security after it had been prepared originally in Davis' chambers by Kaufman and Lord. It is apparent that some revision was made, but the evidence does not definitely show who it was that made it. It is perhaps not very important as there is no doubt from the testimony and the correspondence that every detail of the arrangement of this loan was attended to by Davis without consultation with Kaufman.

This, of itself, is not sufficient to justify the conclusion requested by Amici that the loan was made on Davis' behalf, but there is certain further evidence as to what was done after the contract had been executed and the money paid over.

On February 19, 1936, the day before Stokley had agreed in his contract with Kaufman to pay the delinquent county taxes, Davis sent a telegram to Stokley warning him not to forget to pay his taxes on time (R. 2387, 2758). Stokley was unable to pay these taxes and other obligations at that time and on March 10, 1936, Davis obtained a loan from one Ungerleider in Philadelphia in the amount of $4,000, and immediately loaned it to Stokley. With this money Stokley was able to discharge a lien on his fruit crop as well as to pay the taxes (R. 2755-2768). Davis is largely indebted to Ungerleider at the present time. Later in the same month, March 31, 1936, Stokley wrote Davis this his first payment of interest on the Kaufman loan would be a little late. There is no evidence that any explanation was given to Kaufman. Many of the letters passing between Stokley and Davis contain expressions indicating that it was Davis and not Kaufman who was the real party in interest.

More important, however, than these statements, although of much weight when their number and character are considered, are certain payments which Stokley made to Judge Davis during the period from the date of the Stokley loan until the investigation was begun. He made payments, inter alia, to Davis which were retained by him, as follows: $200 on June 22, 1936; $200 on July 7, 1936; $400 in February, 1937; $200 on August 1, 1937; and $400 on February 28, 1938. Davis now says these payments were

on account of the principal of the $4,000 loan (R. 2414), but that they were interest payments is indicated by such contemporary documentary evidence as there is. The first payment mentioned above Stokley referred to in a letter of June 18, 1936, saying: "I shall send on interest Saturday to you." (Amici Ex. 115, R. 2432-2433). That these payments were not made on account of the principal of the $4,000 loan is also apparent from the fact that Stokley on February 9, 1937, paid $320 to Davis as a full year's interest at 8% on the loan of $4,000 due March 10, 1937 (R. 2414). Had the earlier payments actually been applied to the principal of this loan, it would have been reduced accordingly and the interest would not have amounted to $320. Moreover, Stokley wrote to Davis on March 25, 1937, that he was sending $500 as "first payment on Orange Co. Grove", which was the security for the $4,000 loan (Amici Ex. 114, R. 2427). Davis acknowledged this letter and check as a payment on account of principal of the $4,000 loan (Amici Ex. 114, R. 2428), and did not dissent from Stokley's statement that it was the *first* payment.

The last payment above noted made on February 28, 1938, Davis said he thought was made in cash or at least that it might have been so made (R. 4094-4096). This, however, appeared not to be the case from the testimony of Wilmer Stokley, who had acted as secretary for his father and who recalled that this payment had been discussed with Judge Davis, that it was made by check and that it was a payment of interest. He also said that he was quite sure that it was so designated both on the face of the check and the corresponding stub (R. 4316-4320). Neither the cancelled check nor the stub of this check was produced, although the amount of the check appeared in

Stokley's account at the Bank of Tavares as having been charged against his account on March 15, 1938 (R. 4333). The check book covering the period during which this check was apparently drawn was, however, produced. It contained no stub corresponding to this $400 payment, although it shows on a stub dated February 28, 1938, that there was then a balance of $531.82 in the bank, and the stub immediately following, dated March 1st, shows a balance of $131.82, indicating that on one of these dates a check might have been drawn in the amount of $400. This stub book is an exhibit in this case, (Amici Ex. 235, R. 4354). It shows between the two stubs dated February 28th and March 1st, respectively, a very small portion of an intervening stub which had been torn out. This had been carefully done; a casual inspection would not disclose the fact that a stub had been removed. A list of "Expenses" made by Wilmer Stokley for his father in September 1938 contained an item reading "Interest paid Judge Davis 2/28/38, $400". (R. 3910-11). Judge Davis presented an account book showing these payments as on account of principal of the $4,000 loan. He said he was "dead sure" the entries in this book were made contemporaneously with the dates of payment (R. 4119), but when his secretary was called it appeared the items were copied from some earlier record which was said to have been destroyed (R. 4217-4220, 4244).

Judge Davis' testimony, supported in part by his secretary, that these payments were not interest payments but were payments on account of the principal of the $4,000 loan, must be rejected in view of the documentary and other evidence to which reference has been made. That these payments were not interest on the $4,000 loan is obvious as

they far exceeded the amount of interest which would have been due on that loan up to the time of the last payment, and Davis himself says that $320 had been paid to him as interest in full on the $4,000 loan up to March 10, 1937. (R. 4111). It is also to be noted that while the payments were made at irregular intervals, they exactly equalled in each case either one-half or one-quarter of a year's interest on the $10,000 loan. There is no claim that interest was due Davis on any transaction other than the $4,000 loan. There is no evidence that Kaufman made any effort to collect the interest due on the $10,000 loan prior to the investigation of Judge Davis. I conclude and find as a fact that upon five separate occasions interest on the $10,000 loan was paid to Davis and retained by him.

An important consideration bearing upon the character of this transaction is the conduct of the parties involved in it. Not only did Davis falsely testify that the interest payments above referred to were payments on account of the principal of his $4,000 loan to Stokley, but Davis and Kaufman made contradictory and false statements as to the date when Kaufman was first spoken to by Davis with respect to the $10,000 loan.

Stokley lived in Mount Dora, Florida, and Davis stopped there over night in January, 1935, on his way to a small hotel known as the Battle Creek Sanitarium, near Miami, where he expected to spend some time on his vacation. During this visit Stokley told Davis about the loss of his orange grove properties and asked him whether he could assist him in obtaining a loan to redeem them, provided he could arrange to compromise his indebtedness to the Town. Davis promised to see what he could do and upon his return from his vacation early in March, 1935, again

stopped at Stokley's house and, Stokley says, told him that he had arranged to procure the necessary money, if the security was adequate, from Morgan S. Kaufman (R. 2658-2661).

Stokley had previously testified on this point before the Grand Jury in New York. Referring to the interview in Judge Davis' chambers, when the loan was arranged, he testified:

> "Q. That was the first time then that you had heard of Morgan Kaufman's name in this picture? A. The first time I ever seen him was when I got—
>
> "Q. That wasn't my question. Is this the first time you had ever heard of his name in this picture? A. Yes—no—please put down no. He spoke of it, gentlemen—
>
> Q. Who is he? A. Davis spoke of a gentleman in Miami that was spending the winter that he would see him and possibly he would make me the loan, but he didn't know that he would.
>
> "Q. Who was that gentleman? A. That was Kaufman who was spending the winter in Miami where Judge Davis was in the same city.
>
> "Q. When was it that Judge Davis told you this about the man in Miami? A. Possibly at my home or in the grove as I was telling you gentlemen or at the Lakeside Hotel.
>
> "Q. You mean at that original conference that you had with reference to the $10,000 loan? A. Yes, sir.
>
> "Q. In connection with the $10,000 loan how many times was Judge Davis in Florida in connection with that loan? A. He wasn't in connection with the loan; he was in Florida spending the winter and I asked him about the loan and before he left the State of Florida he told me of Kaufman and

would notify me after he found out whether I could get the loan or not."

(Excerpt from Proceedings before the New York Grand Jury filed herewith, pp. 405-406.)

Stokley also said in the same proceedings that when he went to the conference in Judge Davis' chambers he had already heard of Kaufman and understood he was the man who would make the loan. (Id. 460-461)

Davis' and Kaufman's statements with regard to the time when the loan was first discussed are contradictory. In the first criminal trial Davis testified that he first spoke to Kaufman about it "some time in the spring of 1935" (R. 2328). Kaufman, testifying in the first criminal trial, said he told Davis in "the early part of the spring or summer of 1935" that he would make the loan if the value was satisfactory (R. 1863-1864). These two statements are in a measure corroborative of Stokley's statement that Kaufman's name as the prospective lender was disclosed to him in March. When the parties testified in the criminal trials they evidently did not realize the importance of this date.

Davis and Kaufman both now claim that they never discussed this matter until an accidental meeting on the train in August (R. 1864), which would be after the Root case had been decided. Davis also testified that he had endeavored, without success, to obtain the loan from two friends of his, other than Kaufman, both of whom are now deceased, during the period between his visit to Stokley on his way North and the date when he spoke to Kaufman in August. I find that this testimony is untrue and that Kaufman's name was disclosed to Stokley as the prospective lender in March. The false testimony on the part of Davis and Kaufman is a clear indication that the transaction was

an improper one and they were endeavoring to conceal its real nature.

That Stokley knew that the financial arrangements he had made with Judge Davis were not legitimate is apparent from a letter which he wrote to one Eunice Cole dated December 19, 1940 (Amici Ex. 205, R. 3877, 4416). Mrs. Cole evidently had some knowledge with respect to certain of these transactions and, among other things, he said to her:

> "Where I made my mistake I sent the check with a Tavaries Bank ch to Judge D paying my years interest. I *should* have deposited ch from Ins. Co. in Bank of Tavares and made ch for the whole amt. They have sent for me to explain to the High Court why I called this ch in on policy. I shal tell them for business reasons . . . they believe we are holding out or government evidence in regards to the Investigation. *Now pleas* don't know anything or they will pick you to pieces *and* have Mr. Barker up *there* as the government dont mind expences. . . . Should they come questioning you *know nothing.*"

This is not the letter of an ignorant but innocent man. It is the letter of a man who knew at least that he had been involved in proceedings of a doubtful character.

The evidence in this case has convinced me that Davis had a financial interest in the loan made by Kaufman to Stokley and that he received substantial sums on account of this interest prior to the beginning of the investigation of his judicial conduct. There is no evidence before me from which I can find the extent of his interest, but that is not material to the matter submitted to me for investigation. I find that he had an interest and that is sufficient for present purposes.

This brings me to the second question above noted: Was the loan made as compensation to Davis for his favorable decision in the Root case?

Counsel for Universal say in their brief (p. 4):

> "We hold no brief for Kaufman or Davis; certainly the evidence offered upon the criminal trials placed them in no enviable light. We respectfully urge, however . . . that the Master has before him no evidence involving Universal in any dealings with Kaufman and Davis or in any fraud, corruption, obstruction or distortion of justice whatever, or from which any such inference or deduction may reasonably be made."

Counsel for Universal correctly urge that the testimony relating to the Fox case cannot be used against their client as it was not involved in that transaction. I have considered it only as bearing upon the question whether the Stokley loan was a *bona fide* investment by Kaufman or was intended to influence or compensate Davis for judicial action favorable to Kaufman's cases. The question therefore remains whether it was for his action in the Root case or in some other case that this favor was conferred upon him by Kaufman.

At the outset the question arises whether Davis knew that Kaufman was interested in the Root case. Both Davis and Kaufman deny that Davis knew that Kaufman was in the case. As to this there is no direct evidence and we must rely entirely upon inference.

There is, however, evidence which points incontestably to the conclusion that it was understood between Davis and Kaufman that the amount loaned to Stokley should come from the Root fee. Davis must therefore have known Kauf-

man was interested in that case. Davis and Stokley admittedly had been discussing the loan since the latter part of January, 1935. Some time necessarily was consumed in coming to an agreement with the Town of Mount Dora as to the amount which it would accept in payment of the delinquent assessments but there were other facts brought out by the testimony which Amici argue indicate that Davis intentionally delayed final action on the loan until the Root case was finally decided. This is a reasonable assumption from some of the evidence in the case, including the letters passing between the parties but the most convincing evidence that the amount of the loan was to come from the Root fee is a telegram which Davis sent to Cooley on October 4, 1935 (R. 1882), in which he said: "The money has been definitely promised from a reliable source and I think it will be available in a few days." The "reliable source" was admittedly Kaufman (R. 2346). At that time Davis knew that the petition for certiorari would probably be acted upon within a "few days", and had reasonable ground to believe that it would be denied as there was no federal question in the case. That the money was available without waiting for the certiorari to be denied, in the sense that Kaufman had plenty of money in his various bank accounts, is admitted (R. 1873). The only inference which can be drawn from Davis' telegram is that the money from which the loan was to come was not then available, but would be "in a few days." This points unerringly to the conclusion that it was not Kaufman's individual funds which were to be used in making the loan, but funds yet to be received from some other source.

When this evidence is considered in connection with Kaufman's statement that he was not to receive his fee

until the certiorari was denied, the fact that he was paid his fee on the day following the denial of the certiorari, that arrangements for the loan were completed two days thereafter at a conference held in Judge Davis' chambers, and that the check for $10,000 was drawn on a bank account in which the Root fee had been deposited and in which there were at that time not enough other funds to meet the check (R. 1969-1971), the conclusion is irresistible that the understanding between Davis and Kaufman was that when Kaufman got his fee in the Root case $10,000 of it was to be used for the Stokley loan.

The evidence taken in these proceedings has convinced me, and I find, that Davis and Kaufman had an understanding or arrangement between them, although it may have been entirely informal, that in cases in which Kaufman was interested he would procure some financial benefit for Davis in return for favorable judicial action. If this be true, it is incredible that Kaufman, who was retained in a case involving so large an amount of money as the Root case, for a period of three and one-half years prior to the decision, as contended by Universal, or for some lesser period, should not have informed Davis of his interest in it. The testimony shows that they were often together with very intimate relations, and in particular that Kaufman was vacationing with Davis in the South at the very time when the Root case had been assigned to Davis for an opinion.

There does not appear to be any reason for the false testimony given by Davis and Kaufman regarding the date when Davis spoke to Kaufman about the Stokley loan except a desire to disassociate the Stokley loan from the Root case, which in itself gives rise to a strong inference that the two were connected.

Why Davis chose this method of procuring from Kaufman a benefit out of the Root fee can only be conjectured. But whatever the reasons may have been, I find that the Stokley loan was made pursuant to a previous understanding between Davis and Kaufman that Davis was to lend his influence to a favorable decision in the Root case and was to receive some financial benefit out of the fee which Kaufman was to receive.

Counsel for Universal strenuously contend that even if this were true, the decision in this case should not be held to be tainted with fraud if, as they claim, Universal did not know what Kaufman meant to do with the money it paid him. If a litigant pays a large sum of money to a lawyer from whom it neither expects nor receives any legal service, and it is afterwards shown that without its knowledge the lawyer has bribed the judge, it may well be questioned whether the decision of its case is not tainted with fraud. However, although there is no direct evidence that anyone representing Universal agreed with Kaufman that he was to bribe Judge Davis, there is evidence in the record which leads me to conclude that Universal was not entirely innocent.

In the first place, there is the fact that a large fee was paid to a comparatively unknown lawyer who was not competent to assist, and who was not asked to assist, in the litigation, but who was a close friend of Judge Davis. If Universal did not expect legal services from Kaufman, then what services did it expect? As noted above, the testimony of the president of the company, Mr. Halle, on this point was vague and unsatisfactory. (R. 639-641). Moreover, Mr. Halle's testimony is not entirely consistent with frankness. Testifying before the Grand Jury (R. 495) he

claimed he could not recall the names of any of the judges who sat in the Root case, although he admitted at other points in the testimony that the case was of the most vital importance to his company. He also said he could not recall having read the opinion in the case (R. 500), although in view of the importance to his company of the opinion sustaining the validity of the patents, it is scarcely credible that he did not read it at the time. He later admitted that he did (R. 634).

Amici call attention to the fact that a considerable amount of documentary evidence that might throw light upon the connection of Halle and Kaufman has disappeared, but as the records in question might have been lost or destroyed in normal course, I do not rest my decision on that fact.

Halle testified that he had a number of contacts with Kaufman by way of interviews or telephone calls during the period between the date he was said to have been retained in 1932 and the date of the decision in 1935 (R. 518-519). A diary was kept by a receptionist in Halle's office in New York in which there was a careful record of persons who called to see Mr. Halle, to whom he telephoned or who telephoned him. Kaufman's name does not appear anywhere in this record until October 22, 1935 (see statement following R. 4479).

While the omission of Kaufman's name in one or two instances might not seem significant, the fact that his name never appeared during this period, although Halle said he had communicated with him or received visits from him on several different occasions at this office, leads me to the conclusion that Halle's testimony is incorrect and that in fact he did not communicate with Kaufman or receive

visits from him as alleged during this period. It is true, as argued by Universal, that there was no evidence before me that the receptionist's diary was complete, but so far as I could see by my inspection of it, it was a careful record of all persons who called upon or telephoned Mr. Halle during the time he was in the New York office. Even if not a complete record, it is not probable that Kaufman's name would have been inadvertently omitted on every occasion when he called or telephoned.

There is one other respect in which Mr. Halle's testimony was not entirely frank. In the effort to explain the extremely informal character of his dealings with Kaufman and particularly the fact that Kaufman had never submitted a bill of any kind (R. 512), Halle testified before the Grand Jury on February 8, 1940, with considerable emphasis, that some of his attorneys rendered no bills, and when asked for particulars said that the firm of his leading trial counsel, Wall, Haight, Carey & Hartpence, never submitted a bill. He said: "Never had a bill from them; never had a receipt from them; never had any understanding with him [Haight] as to his fees" (R. 547). After Judge Haight's death a letter from a member of his firm, explaining about the destruction of Judge Haight's diaries, referred to his bills in the Root case. These were then requested to be produced and an elaborate bill dated November 15, 1935, was thereupon produced (R. 1471) which covers services in the Root case throughout its entire period to that date. This bill is initialed by Mr. Halle on the last page as being approved (R. 1494). A second bill dated December 18, 1936, was produced which covered further services in the Root case (R. 1498). This bill is likewise initialed by Mr. Halle (R. 1504, 1505). A third bill dated Febru-

ary 2, 1938, was produced covering services subsequent to the bill last mentioned (R. 1509) and this is also initialed by Mr. Halle (R. 1510). Under date of December 9, 1941, two bills from the same firm were presented, one for services in another case and one for general services and these were also initialed by Mr. Halle (R. 1514-1515). There are also in the record letters from Judge Haight to Mr. Halle in which he refers to enclosed bills (see, for example, R. 1516, 1517). In the testimony taken before me, Halle said: (R. 641) "May I say I didn't know until Judge Haight's death what the basis of his charges were to us. When he wanted some money he 'phoned me, or came in, and said, 'Can you let me have some money?' 'How much do you want, Judge?' 'Well, $10,000.' Sometimes it was larger, sometimes it may have been less. I said, 'Certainly.' . . . I never contested what was due him, but there was never any agreement with him."

This testimony was taken at a hearing held on May 13, 1942. Counsel for Universal argue that Mr. Halle's misstatements were due to faulty recollection. I would be inclined to accept this explanation were it not for the fact that Mr. Halle's erroneous statements regarding the bills from Judge Haight and his firm were made in 1940 before the Grand Jury, and two of the bills above referred to were received after that date. Halle must have been aware that he had made a misstatement when he initialed these two bills last referred to. The normal reaction of a witness who made an error of this kind would be to correct it or at least not to repeat the error at a subsequent date. In the proceedings before me, Mr. Halle's testimony before the Grand Jury was offered in evidence, before he testified (R. 475); he did not correct the misstatements he had made, and he

intimated, if he did not definitely say, that he had never had any bills from the Haight firm.

After carefully considering Mr. Halle's testimony and making every allowance for faulty recollection, I am unable to avoid the conclusion that the errors in his testimony were due rather to an over-anxiety to make it appear that Mr. Kaufman's dealings with Universal were similar to Judge Haight's, than to a strict regard for accuracy.

I am convinced that Universal, while it probably did not know exactly what Kaufman would do with the money paid him, did know when it agreed to pay him a substantial fee in the event of a successful outcome of the case that he would use the money or the prospect of receiving it in some way to influence Judge Davis.

Counsel for Universal contend that a decision to affirm the Root case was made at a conference of the judges held on January 17, 1935, and from this they argue that Kaufman's loan to Stokley could not have been intended to bribe the judge in the Root case because the Stokley loan was not mentioned by anybody until Davis was on the way to Florida after this conference was held. The judges may have agreed on January 17th, but the official decision was not announced until June 26, 1935.

However, I do not consider the exact date of the Root decision to be very material. If, as I have found, Davis and Kaufman had an understanding that Kaufman would procure financial benefits for Davis in return for favorable judicial action, Kaufman had undoubtedly informed Davis that he was interested in the Root case. How Davis was to be compensated may not even have been considered prior to the decision. Davis, when he learned of the needs of his impecunious cousin, may have seized upon that as a method

for diverting some of the Root fees into his own pocket in a manner which he thought would not arouse suspicion; or, he may have had other reasons about which it is useless to speculate.

Judge Davis produced a conference memorandum which he says he used at the conference when the case was decided (Amici Exhibit 100. R. 2198). Amici contend that as the case was argued on January 7th and the court was in session several days thereafter prior to January 17th, the date of the conference, Judge Davis must have had assistance in preparing this memorandum and point to certain quotation marks which indicate that a portion of it at least had been copied from some other document. Judge Davis' secretary testified that he did not assist him in the preparation of this memorandum. Amici argue that Kaufman may have submitted some document to Judge Davis for his use in preparing his conference memorandum, and refer to the evidence which indicates that a memorandum of some character was prepared by counsel for Universal between January 7th and January 17th, which was never submitted to opposing counsel or to the court so far as is known. The testimony, however, was that counsel at one time thought that they would submit a supplemental memorandum to the court after the argument, but after preparing it decided not to do so. There is no evidence that this memorandum came into Kaufman's hands or that it was used in any improper way. It is said that all copies of it have been destroyed or have disappeared.

Counsel for Universal argue that the small benefit which Davis appears to have received on any theory of the case should lead me to conclude that the evidence does not support the claim that he was influenced in his decision by

the prospect of receiving it. The difficulty of proof in a case of this character is almost insurmountable. The fact that only a small benefit was proven to have been received by Davis does not preclude the possibility of his having received other benefits. However, the question whether the decision was tainted with fraud depends not upon how much consideration was paid Davis for his vote, but whether there was paid or agreed to be paid to him any consideration whatever in return for his favorable action in this case. Whether the case was rightly decided and whether Davis would have voted as he did regardless of the prospect of receiving something from Kaufman are considerations which do not affect the question at issue. The maintenance of the integrity of judicial action is of such vital importance that if a judge has *any* financial interest in the result of a case pending before him, his decision must be held to be invalidated. See *Tumey* v. *Ohio*, 273 U. S. 510, 524.

Upon the whole record I am forced to the conclusion that there was in connection with this case such fraud as tainted and invalidated the judgments rendered by this court therein on June 26, 1935.

T. R. WHITE,
Master.

ANSWERS TO REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Requests for Findings of Fact Submitted by Amici Curiae

Finding No. 1

The actions entitled "*Universal Oil Products Company* v. *Winkler-Koch Engineering Co. and Root Refining Company*" were consolidated suits brought in the United States District Court for the District of Delaware by Universal Oil Products Company for infringement *inter alia* of United States patents to Egloff, No. 1,537,593, and to Dubbs, No. 1,392,629. The Bills of Complaint were filed, respectively, on March 11, 1929, and July 7, 1931. Service of process was obtained on Root Refining Company but not on Winkler-Koch Engineering Company. Prior to trial, the plaintiff dismissed as to all patents save as to Egloff and Dubbs. The case was tried before Judge Nields at Wilmington, Delaware, beginning on June 21, 1932, and ending on July 28, 1932. On April 27, 1934, the District Court rendered its decision finding validity and infringement of the Dubbs and Egloff patents. An interlocutory decree, in conformance with the decision, was entered on May 18, 1934. On July 12, 1934, an appeal was taken from the decree to the Circuit Court of Appeals for the Third Circuit. Thereafter, briefs on appeal were filed, that of Universal Oil Products Company on December 22, 1934. The case was argued before the Third Circuit Court of Appeals on January 7, 1935, the court sitting being composed of Judges Joseph Buffington, J. Warren Davis, and J. Whitaker Thompson. The decision of that Court, opinion by Judge Davis, affirming the decree below, was rendered on June

26, 1935, and petition for rehearing was denied without opinion on August 6, 1935. A petition for certiorari was filed in the Supreme Court of the United States by Root Refining Company on September 3, 1935, and the said petition was denied by said Court on October 21, 1935.

ANSWER

Affirmed.

FINDING No. 2

The case of *Universal Oil Products Company* v. *Root Refining Company* was of very great importance to the Universal Oil Products Company. At the time the suit was on appeal, Universal Oil Products Company was engaged solely in the licensing of patented processes for the cracking and refining of petroleum, and at that time, its annual license fees ran into millions of dollars. If the Dubbs patent in suit in the *Root* case had been declared invalid or not infringed, Universal's extensive licensing system would have been destroyed. Universal had filed other suits against other refiners on the Dubbs and Egloff patents, some in the Third, and others in other circuits. The *Root* case was the first to be tried and decided.

ANSWER

Affirmed, except that the evidence does not show that Universal's licensing system would have been destroyed. It would, however, have been seriously damaged.

FINDING No. 3

The attorneys for Universal Oil Products Company who prepared for, and conducted the trial of, the *Root* case,

and who prepared the Briefs and argued the said case, both in the lower court and on appeal, and who appeared of record in the District Court and in the Court of Appeals were as follows:

Thomas G. Haight.....Jersey City, N. J.
William F. Hall.:.....Washington, D. C.
Charles M. Thomas.....Washington, D. C.
Hugh M. Morris.....Wilmington, Del.

Each of the foregoing attorneys was exceptionally well qualified in ability and in experience in the field of patent litigation and in petroleum technology, and all of them rendered substantial and extensive services in the *Root* case.

ANSWER

Affirmed.

FINDING No. 4

E. Ennals Berl, an attorney in general practice, of the firm of Ward and Gray, of Wilmington, Delaware, was solicitor of record for Universal Oil Products Company in the *Root* case, performed the usual services of local counsel when the case was pending in the District Court at Wilmington, Delaware, and attended part of the trial.

ANSWER

Affirmed.

FINDING No. 5

Among other patent and general lawyers, who had been employed by Universal in 1932, and prior thereto, were

Frank L. Belknap, Lee J. Gary, Alexander F. Reichmann, Russell Wiles, all of Chicago, Illinois, Richard E. Dwight and William D. Whitney, both of New York City, N. Y., and Lawrence C. Kingsland, of St. Louis, Missouri. All of them were available to Universal throughout the progress of the *Root* case, except Frank L. Belknap, who died on May 10, 1933.

ANSWER

Affirmed.

FINDING No. 6

The amounts paid to the lawyers who appeared of record for Universal Oil Products Company for their services in the *Root* case from its inception through the denial of certiorari, and including the year 1935, were as follows:

Thomas G. Haight	$75,000.00
William F. Hall	49,762.50
Charles M. Thomas	21,868.25
Hugh M. Morris	12,708.34
E. Ennals Berl, (Ward & Gray)	1,073.07

Additional fees paid to these lawyers for further services in connection with subsequent proceedings in the *Root* case, excluding the present investigation, are as follows:

Thomas G. Haight	$11,300.00
William F. Hall	4,950.00
Charles M. Thomas	2,275.00

ANSWER

Affirmed.

Finding No. 7

Morgan S. Kaufman, a Scranton, Pennsylvania, attorney, was also employed and paid by Universal in connection with the *Root* case. Kaufman was admitted to the bar of Lackawanna County, Pennsylvania, in 1905, and from 1913 to 1936 served as a Referee in Bankruptcy in the Middle District of Pennsylvania. He is not, and never was, a patent lawyer, nor a general lawyer specializing in patent cases, nor has he had any technical education or training, nor any experience in the field of petroleum refining, nor any qualifications of any sort that would commend him for service or employment in a patent infringement suit having for its subject matter the technology of oil cracking and refining. It does not appear that he has ever been recognized by the Bench or Bar as a prominent, or outstanding, or eminent lawyer.

Answer

Affirmed.

Finding No. 8

Morgan S. Kaufman was never an attorney of record in the *Root* case, nor does his name appear at any time in any document or record, made or filed in the *Root* case prior to the filing therein, in 1941, of the Petition of amici curiæ. His name does not either appear in any record or document, official or personal, pertaining to the business of Universal Oil Products Company prior to the argument of said case in the Circuit Court of Appeals on January 7, 1935; the first such documentary appearance of his name, so far as the evidence discloses, is in an entry of April 15,

1935, in the private diary of Hiram J. Halle, President of Universal, reading: "Judge Haight called with Morgan Kaufman, attorney."

ANSWER

Affirmed.

FINDING No. 9

Morgan S. Kaufman performed no legal services for Universal Oil Products Company in the *Root* case, either in the District Court or in the Court of Appeals, or in the Supreme Court.

ANSWER

Affirmed.

FINDING No. 10

On October 22, 1935, this being the day following denial, on October 21, 1935, by the Supreme Court of Root's Petition for Certiorari, Universal Oil Products Company, by its President, Hiram J. Halle, delivered its check, dated October 18, 1935, in the sum of $25,000.00 to Morgan S. Kaufman, the check being payable to his order. Universal paid this money to Kaufman in connection with the *Root* case. No previous payment had been made to him by Universal in any case.

ANSWER

Affirmed.

FINDING No. 11

During the year 1936, Universal Oil Products Company made further payments by check to Morgan S. Kaufman as follows:

March 18, 1936	$10,000.00
July 27, 1936	5,000.00
December 2, 1936	10,000.00

In connection with giving instructions for the issuance of the check to Morgan S. Kaufman for the final sum of $10,000.00 on December 2, 1936, Hiram J. Halle requested and obtained from the Accounting Department of the Universal Oil Products Company a pencil memorandum showing dates, voucher numbers, and amounts of all payments, totaling $50,000.00, made to Morgan S. Kaufman by Universal Oil Products Company. No further payment was ever made by Universal to Kaufman.

ANSWER

Affirmed.

FINDING No. 12

As stated in the Petition of the Amici Curiæ and not denied in the Answer thereto, counsel for the defendant in the *Root* case, knew nothing of Kaufman's employment in connection with that case until 1941, when the fact was disclosed in the first criminal trial of Davis and Kaufman. Universal never intended it to be publicly known that Kaufman was employed in connection with the *Root* case and the fact, probably, would never have been publicly known but for said criminal trial.

ANSWER

I refuse this request as stated. There is evidence that some, although not all, counsel in the *Root* case had heard of Kaufman's employment prior to 1941.

FINDING No. 13

Kaufman was not retained by Universal in 1932, and he was not retained on Universal's behalf by Frank L. Belknap. Precisely when Kaufman was employed by Universal does not appear, but it was while the *Root* case was pending on appeal. The sum of $25,000.00 received by Kaufman from Universal in 1935, was not paid to him either as a retainer or as compensation for legal services rendered.

ANSWER

I refuse this request as stated. The evidence does not satisfactorily show when Kaufman was retained. I affirm the request, however, insofar as it requests me to find that the sum of $25,000 paid to Kaufman in 1935 was not paid either as a retainer or as compensation for legal services rendered.

FINDING No. 14

The sums totaling $25,000 received by Kaufman from Universal in 1936 were not, in fact, paid to him either as retainers or as compensation for legal services rendered.

ANSWER

The sums paid to Kaufman in 1936 were not retainers in any normal sense and were not in fact paid, except in part, for legal services rendered or to be rendered.

FINDING No. 15

The sum of $25,000 paid to Kaufman in 1935, and the further sums totaling $25,000 paid to him in 1936, amounting in all to $50,000, were paid by Universal and received by Kaufman, as an agreed-upon amount to be paid to him pursuant to a prior understanding whereby he was to receive this amount only in the event that Universal should be successful in the *Root* case, both in the Court of Appeals and in the Supreme Court.

ANSWER

I refuse this request as stated. $25,000 of the amount in question was to be paid to Kaufman only in the event of a successful outcome of the *Root* case. $5,000 was subsequently added to this as additional compensation. The other payments were not satisfactorily explained. They were not retainers for legal services in the normal sense, but the evidence does not clearly indicate whether they were paid in anticipation of further services by Kaufman or as the balance of an agreed sum to be paid for the *Root* case. The memorandum which Mr. Halle had before him when he made the final payment to Kaufman may have been made simply for his information as to how much Kaufman had received altogether.

FINDING No. 16

J. Warren Davis, who was one of the Judges of the United States Circuit Court of Appeals for the Third Circuit, and who rendered the opinion of the Court in the *Root* case on appeal, was in financial difficulties due to stock speculations, from and after the latter part of the

year 1929, and throughout the period here in question. The liabilities of the said J. Warren Davis throughout this entire period greatly exceeded his assets.

ANSWER

Affirmed.

FINDING No. 17

Morgan S. Kaufman, long prior to the year 1935, had been an intimate friend of J. Warren Davis and of Judge Joseph Buffington. Kaufman had entertained Davis in Kaufman's home at Towanda, Pennsylvania, and had visited with him elsewhere. David Kaufman, of Philadelphia, the brother of Morgan S. Kaufman, for many years had been an intimate friend of Joseph Buffington and was also well acquainted with J. Warren Davis. Morgan Kaufman frequently visited his brother David at the Bellevue-Stratford Hotel in Philadelphia where he frequently met Judges Davis and Buffington. In January and February of 1934, Morgan Kaufman, David Kaufman, and Judge Joseph Buffington vacationed together at the Miami-Battle Creek Sanitarium at Miami Springs, Florida. For substantially the entire month of February, 1935, while the *Root* case was under consideration by the Court of Appeals, Morgan Kaufman, David Kaufman, Joseph Buffington, and J. Warren Davis vacationed together at the Miami-Battle Creek Sanitarium at Miami Springs, Florida. During the 1934 vacation, the Kaufmans and Buffington, and during the 1935 vacation, the Kaufmans, Davis, and Buffington, were together almost constantly. They ate their meals together and enjoyed their recreations together. They were on terms of intimate friendship.

ANSWER

Affirmed.

FINDING No. 18

Charles Lee Stokley of Mount Dora, Florida, is a cousin of J. Warren Davis. Prior to 1934, Stokley was the owner of certain orange grove properties in Florida, certain of which were within the limits of the town of Mount Dora, Lake County, Florida. In 1934, the town of Mount Dora foreclosed certain paving liens, aggregating $28,000.00, against the Stokley properties within the corporate limits of the town and acquired title thereto by purchase at the foreclosure sale. Stokley had tried unsuccessfully to obtain a loan to redeem these properties, and in January 1935 he solicited Davis for a loan, or for assistance in obtaining one.

ANSWER

Affirmed.

FINDING No. 19

In March 1935, Davis instructed Stokley to ascertain definitely the amount for which the town of Mount Dora would reconvey Stokley's property. On July 2, 1935 the town council of Mount Dora voted to deed back to Stokley for the sum of $10,000 in cash, all of the town's rights in the property which had been acquired by the town under the foreclosure. On July 8, 1935, Stokley was notified of this action by Thomas H. Cooley, the city attorney for the town of Mount Dora, who requested Stokley to make arrangements promptly to raise the $10,000. Davis was thereupon informed of this action.

Affirmed.

FINDING No. 20

Davis caused Stokley and Kaufman to meet in his, Davis', offices on October 24, 1935, two days after Kaufman received $25,000 from Universal, for the purpose of consummating a $10,000 loan for the redemption of Stokley's property. A draft of a loan agreement was made that day, but certain events unexpectedly developed which delayed the closing of the loan. The obstacles in the way of consummating the loan having been removed by Davis' efforts, on November 14, 1935, Morgan S. Kaufman issued his check payable to the order of "B. F. Lord, attorney" in the sum of $10,000 drawn upon his, Kaufman's, account at the Public National Bank & Trust Company of New York, in which account he had deposited the $25,000 received by him on October 22, 1935, from Universal Oil Products Company. Without this deposit, there was not enough money in Kaufman's account in this bank to cover the $10,000 check. This check was certified. The payee therein "B. F. Lord," was the same person as Thorne Lord, who was Judge Davis' law clerk. Lord took the check to Mount Dora, Florida, where it was endorsed by Lord directly to the town of Mount Dora on November 25, 1935, on which occasion Lord received (a) a deed from the town of Mount Dora to Morgan S. Kaufman, conveying the properties upon which the town had foreclosed, (b) a quit-claim deed from Stokley and his wife to Morgan S. Kaufman covering the same property, (c) a warranty deed from Stokley and his wife conveying, as additional security, certain other properties

which had not been foreclosed upon by the town of Mount Dora, and (d) a policy of title insurance issued by the Lake County Abstract Company purporting to guarantee title to most of the property which the town of Mount Dora had conveyed to Kaufman, the policy being subject to unpaid state and county taxes. On this occasion, namely, on November 25, 1935, Stokley signed an agreement, previously signed by Kaufman, providing for the reconveyance to Stokley of the property conveyed to Kaufman by the town of Mount Dora and of the other property conveyed to Kaufman by Stokley and his wife, upon repayment by Stokley of the $10,000 in four annual installments of $2,500 each, together with interest at 8% per annum payable semi-annually, the first installment of principal and interest being due April 1, 1936.

ANSWER

Affirmed.

FINDING No. 21.

On March 10, 1936, J. Warren Davis made a loan of $4,000 to Charles L. Stokley, for which loan Stokley gave security by conveying to Davis certain real estate, separate and distinct from that which Stokley had conveyed to Kaufman.

ANSWER

Affirmed.

FINDING No. 22.

Prior to March, 1939, an investigation into the relationship between Morgan S. Kaufman and J. Warren

Davis was begun by the Federal Bureau of Investigation. The fact of that investigation had come to the attention of Davis, Kaufman, Stokley, and Hiram J. Halle, President of Universal, not later than March, 1939.

ANSWER

Affirmed.

FINDING No. 23

Prior to the consummation of the redemption of Stokley's Mount Dora property, Judge J. Warren Davis personally conducted all of the negotiations relative thereto with Kaufman, Stokley, and the City Attorney of Mount Dora, and prolonged these negotiations, and did not bring them to a conclusion until the *Root* case had been finally disposed of. Davis personally put the written agreement between Stokley and Kaufman in its final form, and Davis' law clerk attended to the formal details of closing the transaction.

ANSWER

Affirmed, except that the evidence does not definitely show that it was Davis who put the written agreement between Stokley and Kaufman in its final form.

FINDING No. 24

Subsequent to the redemption of Stokley's property in Mount Dora, Davis saw to it that Stokley paid the taxes that were delinquent on the said property, and advanced money to Stokley so that he could pay off other obligations, thereby enabling him to pay the said taxes.

ANSWER

I refuse this request as stated. It is true that Davis reminded Stokley that his taxes were due and that he did

make a loan to Stokley about the time when his taxes were paid. The evidence does not definitely show, however, that Davis saw to it that the taxes were paid or that he made the loan specifically in order to enable the taxes and other obligations to be paid.

FINDING No. 25

During the years 1936, 1937, and 1938 Charles L. Stokley paid to Davis, and Davis kept for his own use, interest payments totaling $1,400 on the sum of $10,000 which had been advanced by Kaufman to redeem Stokley's properties.

ANSWER

Affirmed.

FINDING No. 26

Neither before the conveyance to Morgan S. Kaufman in November, 1935, of the Mount Dora property, nor thereafter, until early in 1939, when the United States Department of Justice had begun its investigation into the affairs of J. Warren Davis, did Kaufman interest himself either in the credit standing of Charles L. Stokley, or in the nature, tax situation, or value, of the said property. Kaufman has never seen this property. He never received any payments of interest or principal on the sum of $10,000 which he had paid to the town of Mount Dora to redeem the property until June, 1939, after he, Davis and Stokley had learned of the said investigation.

ANSWER

I affirm this request. Although Kaufman testified that he received $200 by way of interest prior to 1939, he failed

to produce any documentary evidence to support his statement, and I am not satisfied that his testimony on this point was correct.

FINDING No. 27

The contract dated November 25, 1935, between Stokley and Kaufman, and the deeds of Stokley's property to Kaufman made pursuant to the language of the said contract, all constituted a mere legal disguise to conceal the fact that Davis was to be the ultimate recipient, either of the $10,000, and interest thereon at 8%, to be paid to him by Stokley, or, in the event of Stokley's failure to pay the same, of the beneficial interest in the Stokley property to which Kaufman held the bare legal title. Throughout this transaction, as between Davis and Kaufman, Davis was the real party in interest.

ANSWER

I refuse this request as stated, although I have found, as set forth in the body of my report, that Davis was financially interested in the loan. The evidence does not sufficiently show the extent of his interest or that it was a mere legal disguise to conceal the fact that he was to receive the entire amount of the loan in case of repayment.

FINDING No. 28

Prior to the date of his Opinion in the *Root* case, Judge Davis knew that Kaufman was interested on behalf of Universal in that case, and knew that should the decision of the United States Circuit Court of Appeals for the Third Circuit be favorable to Universal and become final, Davis would receive from Kaufman, directly or indirectly, the sum of $10,000.00.

ANSWER:

I refuse this request as stated, although I have found, as set forth in the body of my report, that Judge Davis knew that Kaufman was interested in the *Root* case prior to the date of his opinion. The evidence does not definitely show that Davis would receive or knew that he would receive the sum of $10,000, but he did know or at least expected that he would receive some financial benefit from the fee which Kaufman received in connection with that case.

FINDING No. 29

On May 29, 1936, one William Fox, who was heavily involved financially and deeply in debt, filed a voluntary Petition in Bankruptcy in the United States District Court for the District of New Jersey. Fox was a resident of Atlantic City, Atlantic County, New Jersey, which is within the jurisdiction of the said District Court and within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit. Robert E. Steedle was, at that time, the only Referee in Bankruptcy in Atlantic City, New Jersey, and, in due course, the Fox bankruptcy was referred to him.

ANSWER

Affirmed.

FINDING No. 30

Prior to May, 1936, Morgan S. Kaufman and William Fox were well acquainted socially and in a business way. Excepting for a possible casual introduction in 1932, William Fox and J. Warren Davis were not acquainted until introduced to each other by Morgan S. Kaufman at about

the time of the filing of Fox's bankruptcy Petition. On the occasion of this introduction, Fox explained his financial difficulties to J. Warren Davis and inquired whether Davis knew the Referee who would hear his matter. Fox also solicited the aid of Davis and Kaufman in Fox's bankruptcy proceedings and stated that he would like to have the proceedings follow a certain course under which Fox's claims against his creditors would be heard before the hearing of the creditors' claims against him.

ANSWER

Affirmed.

FINDING No. 31

J. Warren Davis and Morgan S. Kaufman called upon Referee Steedle at about the time of the filing of the Fox bankruptcy Petition and Kaufman, who had only recently made Steedle's acquaintance; introduced Davis to Steedle. Thereafter, Davis took an active interest in Steedle; he entertained Steedle on a fishing boat; he entertained Steedle and his family at dinner; and he invited the Steedles to the wedding of his daughter. J. Warren Davis had not before so entertained Steedle.

ANSWER

Affirmed.

FINDING No. 32

As the result of approaches made by Morgan S. Kaufman and J. Warren Davis, and in view of the subject matter of their conversations, Referee Steedle, at various times from May 2nd to October 1936, made a record of the inci-

dents and conversations involving Davis, Kaufman, and himself on yellow sheets of paper; the contents of these sheets were transcribed in a typewritten memorandum, either by Steedle himself or at his direction, at least three different times in the aforesaid period. This memorandum consists of eight typewritten sheets fastened together with an eyelet, bearing on the margin of each sheet the printed words "Robert E. Steedle, Counsellor-at-Law, Atlantic City, New Jersey." Robert E. Steedle died in the Spring of 1937, and after his death, the typewritten memorandum aforesaid was found in his safe in an official envelope for use by him as Referee in Bankruptcy, marked on the outside in typewriting with the words "Robert E. Steedle, Personal."

ANSWER

I refuse this request in view of the fact that I have now excluded the Steedle memorandum.

FINDING NO. 33

Robert E. Steedle's memorandum was made under such circumstances as to indicate that it is trustworthy, and no intention or motive to deceive may be attributed to Steedle in connection with the preparation of his memorandum. Steedle made his memorandum as an official act in the discharge of his official duty and in the regular course of his profession as a Referee in Bankruptcy.

ANSWER

I refuse this request for the reason stated in answer to request No. 32.

FINDING No. 34

Both before and after the reference of the Fox bankruptcy to Robert E. Steedle, as Referee, and while hearings in said bankruptcy proceedings were being conducted by Steedle, Morgan S. Kaufman and J. Warren Davis were attempting to influence Steedle improperly in the discharge of his duty as a Referee in Bankruptcy, particularly in relation to the Fox bankruptcy proceedings. Both Kaufman and Davis pressed Steedle to proceed therein in the manner desired by Fox, and Davis in furtherance of this plan, held out to Steedle the possibility of Steedle's being appointed District Judge.

ANSWER

I refuse this request as stated, as it depends in part upon the Steedle memorandum, although I have found upon other evidence, as set forth in the body of my report, that Kaufman and Davis did take an unusual interest in Steedle after they knew the Fox bankruptcy petition had been referred to him, and Davis particularly showed him courtesies not warranted by his previous acquaintance.

FINDING No. 35

During the month of July of 1936, Kaufman visited Fox in Atlantic City and told Fox that J. Warren Davis had asked Kaufman to request Fox to loan Davis $15,000.00, stating that Davis was about to provide a wedding for his daughter and that he needed money with which to pay the wedding expenses. Fox told Kaufman he did not have $15,000.00 but that he might try to borrow it. Kaufman said that this would be a good thing to do, and that Kaufman would try to help Fox in his bankruptcy matters. Fox, very shortly thereafter, obtained $15,000.00 and delivered

it to Kaufman who, in turn, delivered this money to Davis, who has never repaid it to Fox.

ANSWER

Affirmed.

FINDING NO. 36

Toward the latter part of the year 1936, Davis made an appointment with Fox to meet him, Davis, in Philadelphia, and they did meet there, pursuant to this appointment, at a hotel. At this meeting, Davis asked Fox to loan him $12,500.00. Subsequently, Fox borrowed from his wife $12,500.00. The money was given to Fox by his daughter Belle Fox. The money consisted of twelve $1,000 bills and $500.00 in lower denominations. Fox took the money delivered to him by his daughter, including the twelve $1,000 bills, and met with Davis by appointment at a street corner in Philadelphia and handed him, Davis, the bills wrapped up in a newspaper. Five of the $1,000 bills delivered by Fox to Davis were deposited by Davis' daughter, Mary Davis Firestone, who had obtained the money from her father, in a bank in St. Augustine, Florida.

ANSWER

Affirmed.

FINDING NO. 37

In the fall of 1936, and thereafter, the United States Circuit Court of Appeals for the Third Circuit had before it five separate appeals involving the Fox bankruptcy, in each of which the decisions of the Referee and of the District Court had been adverse to the interests of Fox. Davis participated in the decision of these appeals, all of which

were reversed in favor of Fox's interests. In one appeal, the disposition of the case was rushed, against vigorous objection, and in another, the disposition of the case was delayed, in spite of vigorous opposition, in both instances to the advantage of Fox. In a third case, the Court of Appeals *sua sponte* received evidence as to the then state of health of Mrs. Eva Fox and reversed an order of the District Court entered over a year before, holding Mrs. Fox in contempt for failing to testify on the ground of ill health. Although the opinions in the five Fox bankruptcy appeals were filed in the name of Judge Joseph Buffington, all of these opinions were written by J. Warren Davis.

ANSWER

Affirmed.

FINDING No. 38

The decisions by Judge Davis in the five Fox bankruptcy appeals to the Circuit Court of Appeals for the Third Circuit were corrupt and had been influenced by William Fox in his favor by payments aggregating $27,500.00 made by him to Judge Davis.

ANSWER

Affirmed.

FINDING No. 39

Judge Davis, during the course of his judicial career in the Court of Appeals for the Third Circuit, let it be known to his fellow judges that he was willing to decide cases coming before him in violation of his judicial oath to adjudge cases only on the merits and without respect to persons.

ANSWER

Refused as not based on any testimony now in the record.

Requests for Conclusions of Law Submitted by Amici Curiae

Conclusion No. 1

During the period from 1935 to 1938, there existed between Judge J. Warren Davis and Morgan S. Kaufman a corrupt and illicit combination to obstruct justice.

Answer

Affirmed.

Conclusion No. 2

Universal Oil Products Company, through its agent Morgan S. Kaufman, by means of a bribe corruptly influenced Judge J. Warren Davis as a member of the Court of Appeals for the Third Circuit in the case entitled *"Root Refining Company, Appellant, v. Universal Oil Products Company, Appellee,"* Appeal Nos. 5546 and 5648, pending in that court, and the decision prepared and filed by the said Judge Davis in said case was in fact rendered by Davis pursuant to his understanding that he would be paid a bribe by Universal Oil Products Company if his decision was favorable to said company.

Answer

I refuse this request as stated, although I have found, as stated in the body of my report, that at the time he voted for affirmance in the *Root* case, Judge Davis knew or at least expected that if the decision was favorable to Universal, he would receive some monetary compensation from Kaufman.

CONCLUSION NO. 3

The judgments of the Court of Appeals for the Third Circuit in the case entitled "*Root Refining Company* v. *Universal Oil Products Company*" are tainted with fraud and corruption and are invalid.

ANSWER

Affirmed.

CONCLUSION NO. 4

Whether or not the decision rendered by Judge J. Warren Davis in the case entitled "*Root Refining Company* v. *Universal Oil Products Company*" is sound in law and in fact is immaterial, and the invalidity of the judgment because of fraud and corruption is in no way affected by consideration of the soundness of the decision.

ANSWER.

Affirmed.

Requests for Findings of Fact Submitted by Universal Oil Products Company

Finding No. 1

The case of *Universal Oil Products Company* v. *Winkler-Koch Engineering Company* and *Root Refining Company* (the consolidation of two cases commenced in 1929 and 1931 respectively) was tried in the United States District Court for the District of Delaware before Judge Nields, beginning on June 21, 1932 and ending on July 28, 1932. On April 27, 1934 the District Court decided the case in favor of Universal, finding that the Dubbs and Egloff patents were valid and infringed. An interlocutory decree in conformity with the decision was entered on May 18, 1934. An appeal was taken to the Circuit Court of Appeals for the Third Circuit on July 12, 1934 and argued on January 7, 1935 before Judges Buffington, Davis and Thompson. On June 26, 1935 the Circuit Court of Appeals affirmed the decree of the District Court. A petition for rehearing was denied on August 6, 1935. On September 3, 1935 a petition for a writ of *certiorari* was filed in the Supreme Court of the United States by Root Refining Company; said petition was denied on October 21, 1935.

Answer

Affirmed.

Finding No. 2

The attorneys for Universal who actually prepared and conducted the trial of the case and prepared the briefs and

argued the case, and whose names appeared of record were Thomas G. Haight, Hugh M. Morris, William F. Hall and Charles M. Thomas.

ANSWER

Affirmed.

FINDING No. 3

William D. Whitney, of the firm of Cravath, de Gersdorff, Swaine & Wood of New York, did a substantial amount of work in the case and wrote a part of the briefs in both courts, although his name did not appear as counsel on the briefs or of record in the *Root* case.

ANSWER

Affirmed.

FINDING No. 4

For many years prior to the *Root* case and until his death in May, 1933, Frank L. Belknap was chief patent counsel for Universal. In that capacity, Belknap had complete authority over the conduct of all patent litigation in which Universal was engaged, including authority to retain such lawyers as he deemed advisable.

ANSWER

I refuse this request as stated. The testimony does not show that Belknap had complete authority over the question as to what lawyers should be retained.

FINDING No. 5

In the spring of 1932, Universal had no counsel in Pennsylvania and was contemplating the institution of important litigation in that State.

ANSWER

Affirmed.

FINDING No. 6

In the spring of 1932, Belknap retained Morgan S. Kaufman, a Scranton attorney, on behalf of Universal.

ANSWER

I refuse this request. The evidence does not satisfactorily show when Kaufman was retained or who retained him.

FINDING No. 7

At the time of his employment by Belknap, Kaufman was a prominent member of the legal profession in Pennsylvania, well known to the judges of the State and Federal courts of Pennsylvania.

ANSWER

I refuse this request. Prior to 1932, Kaufman had practiced very little in the courts, although he was a Referee in Bankruptcy. It is true he appears to have been known to at least some of the judges of the State and Federal courts by reason of the fact that he made a practice of entertaining them.

FINDING No. 8

In 1932 and prior thereto Kaufman practiced in both the state and federal courts and had appeared as counsel for litigants in cases before the United States Circuit Court of Appeals for the Third Circuit.

ANSWER

Affirmed.

FINDING No. 9

At the time Belknap retained Kaufman, he insisted, as a term of Kaufman's employment, that Kaufman should not accept employment from any other oil company whose interest might conflict with Universal's.

ANSWER

Refused, as not established by satisfactory credible evidence.

FINDING No. 10

At that time Belknap advised Kaufman of the pendency of the *Root* case and informed him that Universal contemplated bringing certain actions in Pennsylvania in which he desired Kaufman to be active.

ANSWER

Refused, as not established by satisfactory credible evidence.

FINDING No. 11

Belknap did not make any specific arrangement in 1932 regarding Kaufman's compensation but merely assured Kaufman that he would be well compensated.

ANSWER

Refused, as not established by satisfactory credible evidence.

FINDING No. 12

At the time Belknap retained Kaufman, he advised Halle of that fact.

ANSWER

Refused, as not established by satisfactory credible evidence.

FINDING No. 13

One of the reasons Belknap retained Kaufman in 1932 was that he "wouldn't like to have Kaufman in on the side of the people we [Universal] were suing".

ANSWER

Refused, as not established by satisfactory credible evidence.

FINDING No. 14

After he had retained Kaufman, Belknap advised Judges Haight and Morris and Hall and Thomas of that fact and that Kaufman was available to them generally for any work they might wish him to do in the *Root* case.

ANSWER

Refused. The evidence does not satisfactorily show the facts I am asked to find by this request.

FINDING No. 15

Kaufman was not called upon to take any active part in the Root litigation because Judge Haight thought there was not sufficient time to educate a new lawyer in the issues involved in the case.

ANSWER

I refuse this request insofar as it suggests that the only reason for not using Kaufman's services was Judge Haight's feeling that there was not time to educate him.

FINDING No. 16

Judge Morris did not place Kaufman's name on the brief in the District Court, as he believed the list of lawyers was already long enough.

ANSWER

I refuse this request as stated. Judge Morris was very uncertain when he first knew Kaufman was retained; when he heard Kaufman's name mentioned in 1941 he at first had no recollection that he had ever been connected with the case.

FINDING No. 17

Kaufman's name was not placed on the brief in the Circuit Court of Appeals because Judge Haight thought that the addition of Kaufman's name to the brief, when he had been inactive at the trial, might be resented by Judge Buffington, who was a close personal friend of Kaufman.

ANSWER

Affirmed.

FINDING No. 18

Kaufman first casually mentioned the subject of his retainer fee to Halle in 1934.

ANSWER

I refuse this request as stated. The contemporary documentary evidence does not sustain Halle's testimony that Kaufman had talked with him in 1934.

FINDING No. 19

Sometime prior to September 12, 1935, Kaufman called on Halle and asked for the payment of $35,000 for the period he had been under retainer. Halle stated he would recommend a compromise payment of $25,000.

ANSWER

I refuse this request as stated. Kaufman was paid $25,000 on October 22, 1935, but how this sum was agreed upon, or when, depended entirely upon the testimony of Halle, upon which I am unwilling to base a finding.

FINDING No. 20

On September 12, 1935, a conference was held at Universal's office in New York at which Halle, Haight, Whitney and Dwight were present.

ANSWER

Affirmed.

FINDING No. 21

Richard E. Dwight and William D. Whitney were general counsel of Universal, and also represented, respec-

tively, Standard Oil Company of California and Shell Union Oil Corporation, the voting stockholders of Universal.

ANSWER

Affirmed.

FINDING No. 22

At the September 12, 1935 conference Halle and Haight told Whitney and Dwight that Kaufman had been engaged in 1932 by Belknap and that he had been under a general retainer for more than three years.

ANSWER

I refuse this request as stated. The evidence has not convinced me that Judge Haight made any statement of his own knowledge with respect to the time when Kaufman was retained or the terms of his retainer.

FINDING No. 23

At the September 12, 1935 conference Halle advised Whitney and Dwight in Haight's presence that Belknap had promised Kaufman that he would be liberally compensated and that Kaufman had been in to see Halle and had asked for $35,000.

ANSWER

I affirm this request insofar as it says that Halle made the statements alleged of which there is evidence. I refuse it insofar as it seems to suggest that Judge Haight by his presence assented of his own knowledge to what Halle said.

FINDING No. 24

At the September 12, 1935 conference, Judge Haight advised Whitney, Dwight and Halle that Kaufman had performed no actual service in the *Root* case and that his compensation was solely a matter of retainer. Judge Haight stated that Kaufman had been retained by Belknap in 1932 principally because Universal expected to bring some important litigation in Pennsylvania. Judge Haight also stated that he desired to use Kaufman in the *Crew-Levick* case and in other matters pending or to be brought in the Third Circuit, namely, against Empire and Skelly.

ANSWER

I refuse this request as stated. The testimony as to the conversation at this conference depended entirely upon the unaided recollection of the conferees more than six years after the event, and I am satisfied from all of the testimony in the record that any statements made by Judge Haight with respect to Kaufman were merely a repetition of what he had been told by Halle and that he assumed no responsibility for their accuracy. The evidence has not convinced me that Judge Haight said that he desired to use Kaufman in any other cases.

FINDING No. 25

The conference of September 12, 1935, unanimously approved paying Kaufman $25,000 for his claim for past retainer.

ANSWER

I affirm this request with the qualification that whatever approval was given to Kaufman's fee was based on statements made by Halle.

FINDING No. 26

Dwight and Whitney relied in their action upon the statements of Judge Haight and Halle.

ANSWER

I refuse this request insofar as it infers that Dwight and Whitney relied upon statements of Judge Haight. The evidence has not convinced me that Judge Haight made any statements concerning Kaufman of his own knowledge.

FINDING No. 27

Based upon Judge Haight's statement of his desire to use Kaufman in cases pending or to be brought in the Third Circuit, the conference unanimously approved a further retainer to Kaufman of $10,000.

ANSWER

I refuse this request as stated. What took place at the conference of September 12, 1935, depended principally, if not entirely, upon the testimony of Mr. Dwight, one of the directors of Universal. His diary does not indicate that Kaufman's relation to Universal was discussed at this conference. What he now says is based upon recollection more than six years after the conference was held. After such a lapse of time and with so much discussion as has revolved around Kaufman's connection with Universal, it would not be surprising if his recollection was faulty as to exactly what was said at that time. He was clearly in error in thinking that Judge Haight said he had sent the Root briefs to Kaufman. I do not think the evidence warrants the finding requested.

FINDING No. 28

After the conference had approved the payment of $25,000 to Kaufman, Halle ordered the check five days before the petition for *certiorari* was denied, and the check was actually drawn and the appropriate entries made in the company's books four days before that event.

ANSWER

I affirm this request with the qualification that the approval of the payment to Kaufman was based entirely upon Halle's statements.

FINDING No. 29

Pursuant to the arrangement agreed upon by Halle, Haight, Whitney and Dwight on September 12, 1935, Kaufman was paid his $10,000 retainer fee for 1936 on March 18, 1936.

ANSWER

It is true that Kaufman was paid $10,000 on March 18, 1936. The evidence does not satisfactorily show that it was pursuant to any arrangement agreed upon by Halle, Haight, Whitney and Dwight. I therefore refuse this request as stated.

FINDING No. 30

Kaufman, having learned that Universal had secured an advantageous settlement of the *Mid-Continent* case, requested $10,000 from Halle so as to bring his 1932-1935 retainer fee to the $35,000 which he had originally requested. Halle compromised this request and agreed to pay

Kaufman $5,000. This sum was paid to Kaufman by Universal on July 27, 1936.

ANSWER

It is true that Universal paid Kaufman $5,000 on July 27, 1936. I refuse to find the other facts alleged in this request as not based on satisfactory evidence.

FINDING No. 31

In December 1936, Universal paid Kaufman $10,000 for his retainer for 1937. This payment was made in December 1936 rather than in 1937 at Kaufman's request, purely for his own income tax reasons.

ANSWER

It is true that $10,000 was paid Kaufman on December 2, 1936. The reasons for the payment at that time do not satisfactorily appear. I therefore refuse this request as stated.

FINDING No. 32

The $50,000 paid Kaufman by Universal in 1935 and 1936 did not constitute compensation for services exclusively in the *Root* case.

ANSWER

I refuse this request as stated. The evidence definitely shows that $30,000 of the amount paid Kaufman was for services in the *Root* case. The reasons for the payment of the remaining sum do not satisfactorily appear.

FINDING No. 33

The two payments to Kaufman in 1936 of $10,000 constituted Kaufman's retainers for the years 1936 and 1937, respectively.

ANSWER

Refused. These payments were not retainers in any normal sense and their purpose was obscure. They may have been additional payments for services in the *Root* case.

FINDING No. 34

Kaufman's retainers for the years 1936 and 1937 were to be applied against services rendered in the *Crete-Levick* case and to be rendered in that and other litigation which was then pending or contemplated in the State of Pennsylvania.

ANSWER

Refused. The evidence has not convinced me that these payments were retainers for legal services. They may have been applied against services in the *Crete-Levick* case, which however were not extensive.

FINDING No. 35

All payments made by Universal to Kaufman were fully disclosed, were made by company checks, and were duly entered in the appropriate books of account of the company.

ANSWER

It is true that all payments made by Universal to Kaufman were made by company checks and were entered

in the books of account. It is not clear what is meant by the request for a finding that they "were fully disclosed." The evidence does not indicate anything further except that in the auditor's reports sent to stockholders appear items showing $25,000 paid Kaufman in 1935 and a like amount in 1936.

FINDING No. 36

No effort was made by Halle or by any officer or employee of Universal to conceal or disguise the payments to Kaufman.

ANSWER

Refused.

FINDING No. 37

The appeal in the *Root* case, which was argued on January 7, 1935, was decided in favor of Universal by the Circuit Court of Appeals at a conference held by the Court on January 17, 1935.

ANSWER

The evidence indicates that a conclusion was reached in the *Root* case on January 17, 1935, although neither Judge Buffington nor Judge Davis definitely remembered that it was. The case was technically decided on June 26, 1935.

FINDING No. 38

Immediately after the conference of January 17, 1935, Judge Davis left by motor for a vacation in Florida where

he learned for the first time that his cousin, Charles L. Stokley, was in financial difficulties.

ANSWER

Affirmed.

FINDING No. 39

After his arrival in Florida, Davis learned by letter from Judge Buffington, dated January 18, 1935 and addressed to him at Mount Dora, that to him had been assigned the writing of the opinion in the *Root* case.

ANSWER

Affirmed.

FINDING No. 40

In 1935 cases were assigned by the senior Judge of the Circuit Court of Appeals for the Third Circuit for the writing of opinions only after the determination of the appeal.

ANSWER

The testimony was that it was the usual practice for cases to be assigned for opinions to members of the court only after they had been decided.

FINDING No. 41

Sometime after January 17, 1935, Davis who was then in Florida learned for the first time that some of the property of his cousin Stokley had been foreclosed by the Town of Mount Dora for unpaid paving liens amounting to approximately $29,000 or $30,000.

ANSWER

Affirmed.

FINDING No. 42

Stokley told Davis that he thought he could compromise this indebtedness for about $7,500 and asked Davis to endeavor to obtain a loan to enable him to redeem his property. Davis agreed to do so.

ANSWER

Affirmed.

FINDING No. 43

Upon returning north after his vacation, Davis endeavored to secure a loan of $7,500 for Stokley from John A. Campbell and Robert A. Messler, both of Trenton, N. J.

ANSWER

Refused. The evidence has not convinced me that Davis ever made any application to anyone other than Kaufman for the loan in question.

FINDING No. 44

Davis continued to negotiate with them until at least after July 18, 1935; they ultimately declined to make the loan.

ANSWER

Refused.

FINDING No. 45

Stokley first received a definite offer that the Town of Mount Dora was willing to compromise his tax liens for $10,000 in July, 1935.

ANSWER

Affirmed.

FINDING No. 46

On July 12, 1935, Stokley informed Davis for the first time that the Town's claims could be compromised for $10,000.

ANSWER

Affirmed.

FINDING No. 47

The opinion on the *Root* appeal was filed on June 26, 1935.

ANSWER

Affirmed.

FINDING No. 48

Some time after July 18, 1935, Davis, for the first time, broached to Kaufman the subject of a loan to Stokley.

ANSWER

Refused. The evidence shows that Davis and Kaufman discussed this loan as early as March, 1935.

FINDING No. 49

Kaufman, when approached by Davis, stated that he would be interested in making the loan if the title were good and the value sufficient to afford ample security.

ANSWER

Refused, as not based upon any credible evidence.

FINDING No. 50

On October 24, 1935, Kaufman met Stokley at Judge Davis' chambers in Trenton and agreed, in conference with Stokley and Thorn Lord, Davis' law secretary, to lend Stokley $10,000 to redeem his property.

ANSWER

Affirmed, with the qualification that Davis was financially interested in the loan although it was nominally made by Kaufman.

FINDING No. 51

Kaufman was interested in the return of 8% per annum on his investment, if the security was adequate.

ANSWER

Refused. The evidence does not convince me that Kaufman was interested in this transaction as an investment of his own.

FINDING No. 52

Kaufman insisted that Lord go to Mount Dora, at Stokley's expense, to insure that all proper legal formalities in connection with closing the loan were observed.

ANSWER

Refused. Lord testified that he was only a messenger and was not retained as an attorney to attend to the closing of this transaction.

FINDING No. 53

The delay in the consummation of the loan by Kaufman to Stokley was not due to Davis.

ANSWER

Refused. The evidence does not warrant the conclusion that the delay in the consummation of the loan was not due at least in part to Davis.

FINDING No. 54

The delay in the consummation of the loan by Kaufman to Stokley was not due to Kaufman.

ANSWER

Refused. Kaufman delayed making the loan until he received his fee in the *Root* case.

FINDING No. 55

Late in November a title policy on the Stokley property had been obtained and Lord went to Mount Dora and delivered to the Town Kaufman's check for $10,000 and received from the Town a deed to Kaufman of Stokley's property.

ANSWER

Affirmed.

FINDING No. 56

By agreement dated November 25, 1935, Kaufman agreed to convey the property to Stokley upon payment of the principal amount of $10,000 and interest at 8% per annum; the agreement provided for the payment of interest on April 1st in each year.

ANSWER

Affirmed.

FINDING No. 57

In 1935, and at all times subsequent thereto, the Stokley property was worth at least $20,000.

ANSWER

Refused. There is no competent evidence before me from which I can find what the Stokley property was worth.

FINDING No. 58.

The Stokley loan was made upon ample security.

ANSWER

Refused for the reason above given.

FINDING No. 59

The Stokley loan was a bona fide business transaction.

ANSWER

Refused for the reasons more fully expressed in the body of my report.

FINDING No. 60

All payments made by Universal to Kaufman were made outright, were deposited by Kaufman in his own bank accounts, and constituted funds with which he was free to deal as he saw fit.

ANSWER

Affirmed.

FINDING No. 61

No officer, agent, employee or attorney of Universal in any way expressly or inferentially authorized, directed, suggested or approved the Kaufman loan to Stokley.

ANSWER

Affirmed if no attorney other than Kaufman is meant.

FINDING No. 62

No officer, agent, employee or attorney of Universal had any knowledge of Kaufman's loan to Stokley at the time it was made.

ANSWER

Affirmed except as to Kaufman.

FINDING No. 63

At the time of the Stokley loan, Judge Buffington had not learned that Kaufman was counsel for Universal.

ANSWER

Affirmed.

FINDING No. 64

Judge Buffington first learned that Kaufman had been retained by Universal through newspaper accounts of this investigation.

ANSWER

Affirmed.

FINDING No. 65

At the time of the Stokley loan, Davis had not learned that Kaufman was counsel for Universal.

ANSWER

Refused. The evidence convinces me that Davis did know that Kaufman was counsel for Universal prior to the decision of the case.

FINDING No. 66

Davis first learned that Kaufman had been retained by Universal at the time of the first criminal trial in 1941.

ANSWER

Refused.

FINDING No. 67

At the time of the Stokley loan, Kaufman was counsel of record in at least two cases which were then pending before the Circuit Court of Appeals for the Third Circuit. Universal was not a party to or interested in either case.

ANSWER

Affirmed.

FINDING No. 68

Both cases, which were pending at the time Kaufman made the loan to Stokley, were decided in favor of Kaufman with Davis writing the opinions and with Thompson dissenting in both cases.

ANSWER

Affirmed.

FINDING No. 69

Both cases were ultimately reversed, one by the Supreme Court and the other by the Circuit Court of Appeals for the Third Circuit by affirming a contrary holding by the District Court after a retrial.

ANSWER

Affirmed.

FINDING NO. 70

Subsequent to Kaufman's loan to Stokley and in the spring of 1936, Davis loaned Stokley $4,000 to compromise an $8,000 claim of the Eustis Packing Company, and took as security a deed covering property other than that which had been deeded to Kaufman.

ANSWER

Affirmed.

FINDING NO. 71

Kaufman was unaware of the loan made by Davis to Stokley.

ANSWER

Affirmed.

FINDING NO. 72

At the time Davis loaned Stokley $4,000, and constantly thereafter, Davis urged Stokley to repay his loan as quickly as possible.

ANSWER

Affirmed.

FINDING NO. 73

Stokley has paid to Davis $3,000 on account of the $4,000 principal of Davis' loan, leaving a balance of $1,000 principal and much accumulated interest still unpaid.

ANSWER

I refuse this request as not an accurate statement of the account between Davis and Stokley.

FINDING No. 74

Davis applied all money received from Stokley to principal and interest on Davis' $4,000 loan to Stokley.

ANSWER

Refused. Davis testified in the proceedings before me that he had so applied the money, but the contemporary evidence shows that some of it was received by him as interest on the $10,000 loan, as more fully set forth in the body of my report.

FINDING No. 75

Davis has never received any payments of interest or principal on the Kaufman loan to Stokley.

ANSWER

Refused.

FINDING No. 76

All payments on account of the loan by Kaufman were paid by Stokley directly to Kaufman.

ANSWER

Refused.

FINDING No. 77

Kaufman has received $1,200 from Stokley on account of the interest on his loan.

ANSWER

Refused. I am not convinced that Kaufman received the amount mentioned.

FINDING No. 78

Kaufman did not make the loan to Stokley for the purpose of influencing Davis' vote in the *Root* case.

ANSWER

It is true that Kaufman did not make the loan to Stokley for the purpose of influencing Davis to do something he had already done, but I have found that it was made at least in part to compensate him for the favorable action in the *Root* case which he had already taken.

FINDING No. 79

The loan by Kaufman to Stokley did not in any way affect Judge Davis' vote in the *Root* case.

ANSWER

The loan, of course, could not affect Judge Davis' vote which had already been given; otherwise I answer this request as in the case of request No. 78.

FINDING No. 80

There was at no time during 1935, or at any time prior or subsequent thereto, a conspiracy among Kaufman, Davis and Universal for any purpose whatsoever.

ANSWER

Refused.

FINDING No. 81

Universal had other suits which it might have brought to trial in the Third Circuit in about the year 1936. It could have pressed the *Crew-Levick* case.

ANSWER

Affirmed.

FINDING No. 82

Universal did not press the advantage of the *Root* decision by pushing other litigation in the Third Circuit in 1935 and 1936.

ANSWER

Affirmed.

FINDING No. 83

After *certiorari* had been denied in the *Root* case, Universal agreed with Amici to try, in circuits other than the Third Circuit, cases involving the validity and infringement of the Dubbs and Egloff patents.

ANSWER

Affirmed.

FINDING No. 84

The *Root* case was settled in 1939.

ANSWER

Affirmed.

FINDING No. 85

There are no adverse parties with adverse interests in this proceeding.

ANSWER

Refused. While, technically, amici may not be parties, they were acting in part on behalf of their clients and the interests of their clients and the interests of Universal were adverse.

Requests for Conclusions of Law Submitted by Universal Oil Products Company

Conclusion No. 1

The instant proceeding does not constitute a case or controversy within the meaning of Article III, Section 1 of the Constitution.

Answer

Refused.

Conclusion No. 2

The evidence establishes, as a matter of law, that there was no conspiracy between Universal, Kaufman and Davis, or any persons acting for or on behalf of any of them, to corrupt, obstruct or distort justice in or in connection with the *Root* case.

Answer

Refused.

Conclusion No. 3

There is no evidence of any conspiracy between Universal, Kaufman and Davis, or any persons acting for or on behalf of any of them, to corrupt, obstruct or distort justice in or in connection with the *Root* case.

Answer

Refused.

Conclusion No. 4

The evidence establishes, as a matter of law, that neither Universal, nor any person acting for or on its behalf, participated in any fraud, corruption, obstruction or distortion of justice in or in connection with the *Root* case.

ANSWER

Refused.

CONCLUSION No. 5

There is no evidence that Universal or any person acting for or on its behalf participated in any fraud, corruption, obstruction or distortion of justice in or in connection with the *Root* case.

ANSWER

Refused.

CONCLUSION No. 6

The evidence in this proceeding is, as a matter of law, insufficient to warrant any inference of fraud, corruption, obstruction or distortion of justice in or in connection with the *Root* case.

ANSWER

Refused.

CONCLUSION No. 7

The evidence establishes, as a matter of law, that there were no improper relationship or dealings of any nature whatsoever between Universal, Kaufman and Davis in or in connection with the *Root* case.

ANSWER

Refused.

CONCLUSION No. 8

The evidence is, as a matter of law, insufficient to warrant any inference of improper relationship or dealings of

any nature whatsoever between Universal, Kaufman and Davis in or in connection with the *Root* case.

ANSWER

Refused.

CONCLUSION No. 9

Evidence of any relationship or dealings between Davis, Kaufman and Fox in 1936 is, as a matter of law, incompetent, irrelevant and immaterial in this proceeding.

ANSWER

Refused.

CONCLUSION No. 10

Evidence of any relationship or dealings between Davis and Kaufman from 1936 to 1938 is, as a matter of law, incompetent, irrelevant and immaterial in this proceeding.

ANSWER

Refused.

CONCLUSION No. 11

There is, as a matter of law, no evidence of a corrupt and illicit combination, between Davis and Kaufman in 1935, to obstruct justice.

ANSWER

Refused.

CONCLUSION No. 12

There is, as a matter of law, no evidence of a corrupt and illicit combination, between Davis and Kaufman from 1936 to 1938 to obstruct justice.

ANSWER

Refused.

CONCLUSION No. 13

The Steedle memorandum, as a matter of law, is incompetent, irrelevant and immaterial in this proceeding.

ANSWER

As I have now excluded the Steedle memorandum, it is unnecessary to answer this request.

CONCLUSION No. 14

The judgments of the Circuit Court of Appeals for the Third Circuit in the *Root* case are valid and not tainted with fraud, corruption, obstruction or distortion of justice.

ANSWER

Refused.

MEMORANDUM OPINION IN RE OBJECTIONS TO ADMISSIBILITY IN EVIDENCE OF THE STEEDLE MEMORANDUM.

Amici offered a memorandum (R. 3690), hereinafter referred to as the Steedle memorandum, as evidence of the facts stated therein, and counsel have asked me to rule upon its admissibility at this time prior to the conclusion of the testimony.

This memorandum consists of eight typewritten sheets fastened together with an eyelet, bearing on the margin of each sheet the printed words "Robert H. Steedle, Counsellor-at-Law, Atlantic City, N. J." Mr. Steedle was a Referee in Bankruptcy with offices in Atlantic City; he died in the spring of 1937. After his death the memorandum was found in his safe in an official envelope for use by him as Referee in Bankruptcy, marked on the outside in typewriting with the words "ROBERT E. STEEDLE—PERSONAL." It was unsigned.

The memorandum is a record of certain incidents stated therein to have occurred between the dates of May 2, 1936, and October 4, 1936, which, if believed, would indicate that Morgan S. Kaufman and Judge J. Warren Davis were attempting to influence Mr. Steedle improperly in the discharge of his duty as a Referee in Bankruptcy, particularly in relation to the bankruptcy proceedings of one William Fox.

Counsel for Universal object to the admission in evidence of this memorandum on four grounds, which are stated as follows:

First: Its authenticity has not been established;

Second: It is not admissible either under the provisions of the Judicial Code, 28 USCA §695,

or 28 Pennsylvania Statutes Annotated, §91(b);

Third: It is not admissible under the exception to the hearsay rule applying to records maintained by a public official; and

Fourth: It is not admissible as a part of the *res gestae*.

Amici contend that the authenticity of the memorandum has been established and that it is admissible either as a part of the *res gestae* or as an exception to the hearsay rule.

On the question of the authenticity of the memorandum, I find that it has been sufficiently proven and identified. Three witnesses testified that in the summer or early autumn of 1936, Mr. Steedle had shown them this memorandum as a recital of incidents which he apparently thought should be recorded in some permanent form. One of these, his secretary, testified that the memorandum contained the substance of notes which Mr. Steedle had made in his own handwriting on yellow sheets of paper at different times during the spring and summer of 1936 (R. 3686, 3687, 3710). The witness was somewhat uncertain as to the exact time when the notes were transferred to the typewritten pages, but was clear in her recollection that this occurred upon at least three occasions (R. 3692, 3702).

Although the witness became somewhat confused on cross-examination, I am satisfied that the above summary of her testimony is a fair statement of its meaning, and I find that a record of the incidents recited in the memorandum now offered in evidence was first written by Mr. Steedle on yellow sheets of paper at various times from May to October of 1936; that the contents of these sheets were

transcribed in the form in which they are now offered either by Mr. Steedle himself or at his direction at least three different times during that period; and that the authenticity of the memorandum has been established.

The memorandum is offered as part of the *res gestae*. I find that it is not admissible on this ground. It is argued that the principal fact under consideration is whether Davis and Kaufman were attempting to influence Steedle and that the memorandum may be considered to be part of that transaction. The difficulty with this argument is that the statements made in the memorandum or the memorandum itself are not part of the transaction. The memorandum is rather in the nature of a narration by Mr. Steedle of facts such as statements made by Davis or by Kaufman, or by Steedle to them. These might be a part of the *res gestae*, but a memorandum made after the incidents had occurred is, in my opinion, a mere narration of events and not a part of the transaction itself.

There remains the much more difficult question whether the memorandum is admissible, either at common law or under any applicable statute, as an exception to the hearsay rule. The courts, even at common law, have admitted hearsay statements under some circumstances especially where the declarants were unavailable as witnesses and the facts were such as to afford a reasonable guarantee of the truthfulness of the statements. Dying declarations, statements against interest, declarations about family history, attestations of subscribing witnesses, statements of deceased persons under some circumstances, official statements, spontaneous exclamations, and regular entries in the course of business are instances of hearsay statements which are held admissible under the rule of the common law.

There are certain expressions in the opinions of the courts, both in England and America, which seem to suggest that statements of deceased persons concerning relevant facts, if fully authenticated, should be received in evidence from the necessity of the case wherever the circumstances are such as to show that the declarant was disinterested, that the declaration was made before the dispute involved in the litigation had arisen, and that the declarant had peculiar means of knowledge of the subject to which he referred. See, for example, the remarks of Jessel, M. R., in *Sugden* v. *St. Leonards*, L.R. 1 P.D. 154 (cited in Wigmore, 3d Edition, Vol. V, Sec. 1420, and a dictum of a similar nature in *Chaffee & Co.* v. *United States*, 18 Wallace 516, at p. 541).

Mr. Wigmore expresses the opinion that the rule should be that all statements of deceased persons should be admitted as evidence of facts stated by them, in view of the necessity of the case, "leaving the application of the rule to the trial Court," (Wigmore, 3d Edition, Vol. V, Sec. 1427). He also points out that some states have adopted this rule by statute (Wigmore, 3d Edition, Vol. V, Sec. 1576). Such a rule has been recommended by a committee of the American Bar Association and by the American Law Institute, which, in its Code of Evidence just published, provides in Rule 503:

> "Evidence of a hearsay declaration is admissible if the judge finds that the declarant
>
> "(a) is unavailable as a witness. . . ."

This rule is recognized by its authors to be in advance of the law as at present laid down by the decisions of the courts, but there are some cases which come very close to the case now under discussion.

In *Nicholls* v. *Webb*, 8 Wheaton 326, it was held that the books of a notary public were admissible in evidence after his decease to prove a demand of payment and notice of non-payment of a promissory note. The court held, p. 337:

> "We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is of course liable to be impugned by other evidence; and to be encountered by any presumptions of facts which diminish its credibility or certainty. *A fortiori* we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence."

In *LeBrun* v. *Boston & Maine Railroad*, 83 N. H. 293, one question involved was the extent and nature of the plaintiff's injuries. The defendant offered in evidence the report of its surgeon (since deceased) made at the time he examined the plaintiff, containing certain statements which were inconsistent with the plaintiff's testimony. The Court admitted the report, saying in the course of its opinion (pp. 299, 300):

> "To qualify an entry under the exception to the hearsay rule there must be a necessity for its admission as evidence, and the circumstances under which it was made must be such as to guarantee that the statements therein are fairly trustworthy. *Roberts* v. *Company*, 78 N. H. 491, 494. . . . The circumstantial

trustworthiness of the report is supported by the fact that the examination, and the entry thereof, were made in the regular course of the business he had undertaken to perform and for the accuracy and truthfulness of which he assumed responsibility, there being an absence of evidence of any controlling motive to misrepresent.

. . . . . .

"The fact that the record does not disclose the number and frequency of such entries by the defendant's surgeons in general, or by Dr. Stillings in particular, does not demonstrate the unreliability of the entry. The degree of regularity goes only to its weight as evidence in support of the trustworthiness of the recorded statements. The question of the fulfillment of the requirement of regularity presented a question in the first instance for the trial court."

In *Kennedy* v. *Doyle*, 92 Mass. (10 Allen) 161, the court held admissible a church record of baptism kept by a priest, who had since died, stating near the end of its opinion, p. 167:

"In the United States, the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded." Citing further decisions on similar points.

In *Leland* v. *Cameron et al.*, 31 N. Y. 115, an entry made by an attorney who had since died, showing the issue of a fi. fa. on a certain date was admitted. The court said, p. 121:

> "The rule of evidence applicable to entries made by deceased persons, is thus stated in 1 C. & H., note 675; that all entries or memoranda made in their course of business or duty by any one who would, at the time, have been a competent witness of the fact which he registers, are competent." Citing certain instances.

In *Fisher et al. v. The Mayor et al.*, 67 N. Y. (Court of Appeals) 73, the court admitted an entry made by an attorney, since deceased, as proof of the confirmation of a report assessing damages for the taking of certain property, where the order of confirmation could not be found, saying:

> "Entries made by third persons in the usual course of professional employment contemporaneously with the transaction recorded, are admissible to prove the fact stated, after the death of the person by whom the entry was made. . . . There is no absolute duty resting upon an attorney to make such an entry, but this is not essential, it is sufficient if the entry was the natural concomitant of the transaction to which it relates, and usually accompanies it."

In *Jameson v. First Savings Bank & Trust Co.*, 103 A. L. R. 1492 (New Mexico, 55 P. (2d) 743), the court admitted an entry in a memorandum book kept by a lawyer, since deceased, in which it was his custom to make entries of important matters of business happening during the day, for the purpose of proving that he had by a telephone conversation received authority to execute an assignment for a client. There is an annotation following the report of this case, 103 A. L. R. 1501, reviewing the cases on this subject which need not be further discussed.

The tendency of the cases is clearly toward greater liberality in the admission of the declarations of deceased

persons where the declarations are made under such circumstances as to indicate that they are trustworthy, this safeguard being considered a substitute in some measure for the right to cross-examine. The fact that a declaration is made in written form in the regular course of the business or professional work of the declarant is considered to be a sufficient test of its reliability where no element appears suggesting an intention or motive to deceive.

In the case before us it is clear that whether or not the memorandum was made in the course of Mr. Steedle's professional work (a point to be later discussed) he was disinterested in the present investigation as it was not begun until after his death. It might be contended with some force that making a record of the incidents referred to was against Mr. Steedle's interest in view of the fact that he did not disqualify himself but continued to act as a Referee in Bankruptcy in the case of William Fox. If his rulings had been favorable to Mr. Fox, the memorandum might have led to the conclusion that he had been influenced by the acts of Messrs. Davis and Kaufman, whereas if his rulings were principally against Mr. Fox, as they were, a question might be raised as to whether he had not been unduly influenced against the bankrupt by the incidents recorded in the memorandum. Considerations of this character have been held to be such interest as may affect the admissibility of a declarant's statement: *Hines* v. *Com.*, 136 Va. 728, 117 S. E. 843; *Brennan* v. *State*, 151 Md. 265, 134 Atl. 149. See also Restatement, Evidence, Rule 509(1).

It is unnecessary to decide whether the authorities above cited would sustain the admissibility of the memorandum under the rules of the common law, as main reliance has been placed upon statutes and rules of court which are clearly intended to extend further the rules of evidence.

The Federal statute, 28 USCA § 695, reads as follows:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640 § 1, 49 Stat. 1561.)"

Concerning the rules of evidence to be applied in the Federal courts, the Rules of Civil Procedure provide, in Rule 43a, as follows:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

The Pennsylvania statute reads as follows:

> "A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Act of May 4, 1939, P. L. 42, §2, (28 P. S. §91b).

Both statutes provide that the "record" (to use the language of the Pennsylvania act) or the "memorandum or record" (to quote the Federal act) must have been made in the regular course of business, but the Pennsylvania Act is more liberal in omitting the requirement that it must have been the regular course of such business to make such a memorandum or record.

The word "business" is defined in the Pennsylvania Act to include

> "every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not." Act of May 4, 1939, P. L. 42, §1, (28 P. S. §91a).

The question then is presented whether the memorandum was made by Referee Steedle in the "regular course" of his profession as a Referee in Bankruptcy "at or near the time" of the incidents which it records and whether "the sources of information, method and time of preparation were such as to justify its admission."

I find that the sources of information, method and time of preparation were such as to justify the admission of the

memorandum if it was made in the regular course of business within the meaning of the Act. While the dates when Mr. Steedle first recorded the incidents mentioned in the memorandum were not definitely fixed by the testimony, I do not consider this as important as it would be in a case where the record consisted of entries of figures or dates which it would be more difficult to remember with accuracy even for a short time. In substance, the memorandum consists of a recital of various incidents of which the exact dates are not very material and the yellow sheets were written and the memorandum was made at different times between May 2nd and October 4th, the period during which all the incidents are alleged to have occurred. I do not think the time which may have elapsed after the happening of the alleged events before Mr. Steedle made a record of them casts sufficient doubt upon the accuracy of his recollection to make the statement inadmissible under the statute.

We come then to the final question, was the memorandum made in the regular course of Mr. Steedle's profession as a Referee in Bankruptcy?

Counsel on both sides of this controversy have discussed *Hoffman* v. *Palmer et al.*, 129 F. (2d) 976, a case construing the Federal statute, but it does not help us very much in the solution of this problem.

The court excluded the written report of an engineer who had been involved in a railway accident and was deceased at the time of the trial because very evidently his account would not be disinterested. It was assumed that the report was made in the course of business. There was a dissent by one member of the court on the ground that under the Federal statute the statement of a deceased person made in the regular course of business is admissible whether the witness was disinterested or otherwise.

Counsel have also cited *Freedman v. The Mutual Life Insurance Company of New York*, 342 Pa. 404, a case construing the Pennsylvania statute. In this case, the court admitted in evidence as documentary proof the written records of a physician, including, among other things, statements made to him by a deceased insured, although the physician was alive and a witness at the trial. The court held the evidence admissible at common law but also said if any doubt existed it was removed by the statute.

The court did not discuss, for it had no occasion to do so, the distinction between the Federal statute and the Pennsylvania statute, but the significance of the omission in the Pennsylvania statute is not to be ignored. Whereas the Federal statute requires not only that the record shall be made in the regular course of business, but that it shall have been the regular course of that business for such a record to be made, the Pennsylvania statute omits the latter requirement altogether. The Pennsylvania Act is a copy of the uniform act prepared by a Committee of the American Bar Association. It cannot be assumed that there was no reason for the omission of the clause referred to, particularly as the Pennsylvania Act was enacted later than the Federal statute. It seems clear that the intention of the Pennsylvania legislature was to liberalize further the rules of evidence by permitting a record to be admitted if it was made in the regular course of a business or profession, even though it was not usual or customary for such a record to be made in that particular business or profession. The argument that the Steedle memorandum is inadmissible, because it has not been shown that it was the regular course of business of a Referee in Bankruptcy to make such memoranda, must therefore be rejected.

It is argued, however, that the memorandum was not made in the regular course of Mr. Steedle's professional work because it relates to the actions of others rather than to anything which he did as a Referee and because, it is argued, the memorandum itself is "not consistent with a regular systematic practice of making entries recording contemporaneously events as they happened." The admission of a "record" under the Act, however, does not appear to be limited to cases where there is a "regular systematic practice." It evidently contemplates a record of a single "act, condition or event" if made in the regular course of business and there is no requirement of a systematic practice of recording such or any events.

The question is one of unusual difficulty for I have found no record of any other instance where a judicial or quasi-judicial officer has had occasion to record acts which he believed were intended to corrupt his official action. Where he does so, however, I am unable to conclude that the record is not made in the course of his profession as a judicial officer. It certainly relates to his judicial work. Whether it is made in the *regular* course of his profession depends upon the meaning of the word "regular" as used in the statute. I am of opinion that it means no more than that the record should have been made during the progress of declarant's professional work and at times reasonably related to the happening of the events recorded.

I am mindful of the statement of the court in *LeBrun* v. *Boston & Maine Railroad, supra,* in which, referring to the record admitted in that case, it said:

> "The degree of regularity goes only to its weight as evidence in support of the trustworthiness of the recorded statements. The question of the fulfill-

ment of the requirement of regularity presented a question in the first instance for the trial court."

The memorandum in this case was not made all at one time. The notes which Mr. Steedle originally made in longhand on yellow sheets of paper and the contents of which were subsequently incorporated into the memorandum were made at various times reasonably related to the dates of the events themselves and the memorandum was made during the period of the happening of these events upon at least three different occasions. It was not made solely for the personal satisfaction of Mr. Steedle but because he was evidently disturbed by what he thought were efforts to obstruct justice. The care which he exercised in the preparation and custody of the memorandum indicates that he considered it to be a part of his official duty to record the facts stated therein. I conclude that the memorandum was made by Mr. Steedle in the regular course of his profession as a Referee in Bankruptcy.

The Rule of Civil Procedure quoted above (Rules of Civil Procedure 43a) provides in part: "In any case, the statute or rule which favors the reception of the evidence governs." While this provision of the rule may not be intended further to enlarge the rules of evidence, it is indicative of the attitude of both rulemakers and courts and suggests that if there is a doubt, it should be resolved in favor of the admissibility of evidence.

I overrule the objection and admit the memorandum in evidence.

I am the more willing to adopt this course because the memorandum refers to acts and statements of living persons, particularly Mr. Kaufman and Judge Davis, and to incidents which may be disproved, if the statements con-

cerning them are untrue, by calling witnesses who are available. Kaufman and Davis have both testified and have admitted in part and denied in part the incidents mentioned in the memorandum. They are still available and may be recalled as witnesses if counsel believe the statements contained in the memorandum can be further refuted. Copies of the memorandum have been in the possession of all counsel for several weeks.

In making this ruling I decide nothing concerning the relevancy of the statements contained in the memorandum.

T. R. WHITE
Master

January 29, 1943.

EXHIBIT 15

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5648, 5546 October Term, 1943.

UNIVERSAL OIL PRODUCTS COMPANY

v.

ROOT REFINING COMPANY

Appellant

Order

Present: BIGGS, MARIS, JONES, GOODRICH, MCLAUGHLIN, *Circuit Judges.*

This Court on November 26, 1941 having appointed Thomas Raeburn White, Esquire, Special Master with authority to examine, investigate and to make and report to this Court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman, and former Circuit Judge J. Warren Davis, and any and all persons acting for or on behalf of any of them in connection with the above entitled causes and the entire subject matter of the prosecution and disposition of the said causes, and in particular whether there was in connection therewith such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judg-

ments rendered by this Court in the above entitled causes on June 26, 1935; and

The Special Master having filed his report on October 19, 1943 to which exceptions were filed by both appellee and amici curiae; and

The exceptions having been fully argued by counsel and the Court having examined the evidence taken by the Special Master;

Upon consideration thereof the Court hereby dismisses the exceptions and adopts the findings of fact and conclusions of law of the Special Master as the findings of fact and conclusions of law of the Court.

And it is ordered that the judgments of this Court in the above entitled causes entered on June 26, 1935 be and the same are hereby vacated and that the mandates issued on October 30, 1935 to the District Court be recalled. The Clerk is directed thereupon to restore the causes to the argument list for reargument.

By the Court

JOHN BIGGS, JR.
Circuit Judge.

June 15, 1944.

EXHIBIT 16

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY,
Defendant-Appellant

vs.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

Motion

Now come J. Bernhard Thiess and Thorley von Holst, *Amici Curiae,* and move this Honorable Court for an Order directing:

1. That the expenses and compensation of Thomas Raeburn White, Special Master, acting under the Order of this Court entered November 26, 1941, paid by the *Amici Curiae* in the first instance and allowed to the Master by the Order of this Court entered December 14, 1943, be taxed against Universal Oil Products Company, and in favor of said *Amici Curiae* in the amount of $28,481.91.

2. That the costs and disbursements paid by the said *Amici Curiae* during the course of the investigation by the Master under the Order of November 26, 1941, be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $15,488.20.

3. That the other and additional expenses incurred by the *Amici Curiae* during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $11,997.87, or such part thereof as the Court may deem proper.

4. That a reasonable attorney's fee on account of the services of the said *Amici Curiae* and of counsel associated with them during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae*.

5. That the Court set a day certain for the hearing of this Motion.

In support hereof *Amici Curiae* present herewith and attach hereto the following verified exhibits:

EXHIBIT A—A statement of expenses and compensation of Thomas Raeburn White, Special Master, paid by *Amici Curiae*.

EXHIBIT B—A statement of the costs and disbursements paid by *Amici Curiae* during the

course of the investigation of a character customarily taxed as costs.

EXHIBIT C—A statement of the expenses of *Amici Curiae* incurred and paid during the course of the investigation in addition to those items embraced in Exhibits A and B.

EXHIBIT D—A statement of the days and hours of work devoted by each of the *Amici Curiae* and by counsel associated with them in preparation for and participation in the investigation and in the briefing and argument thereof before the Master and before this Court.

J. BERNHARD THIESS

THORLEY VON HOLST

Amici Curiae

EXHIBIT A

STATEMENT OF EXPENSES AND COMPENSATION OF THOMAS RAEBURN WHITE, SPECIAL MASTER, PAID BY AMICI CURIAE

1. Compensation for services allowed by Order of this Court December 14, 1943.	$25,000.00	
2. Disbursements allowed by Order of this Court December 14, 1943	3,495.91	
	$28,495.91	
Less credit for subsequent receipts by the Master	14.00	
		$28,481.91

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

ROBERT W. POORE, being first duly sworn, deposes and says that the foregoing items constitute a true and correct statement of the amounts paid to Thomas Raeburn White, by J. Bernhard Thiess and Thorley von Holst, *Amici Curiae*, pursuant to Order of the Court of Appeals for the Third Circuit, entered December 14, 1943.

ROBERT W. POORE

SUBSCRIBED and SWORN to before me this 24th day of July, 1944.

ANNE E. RYAN
Notary Public
My commission expires May 15, 1947

(Seal)

EXHIBIT B

Costs and Disbursements Paid by Amici Curiae

1. Reporters' Fees		
Transcript of court hearing on June 5, 1941	$ 104.70	
2 transcripts of proceedings before the Master from December 11, 1941, to August 2, 1943	623.32	
2 transcripts of proceedings before the Master from Sept. 9, 1942, to April 2, 1943	2,897.04	
Transcript of oral argument before Court of Appeals	384.90	4,009.96
2. Cost of Printing		
One-half the cost of printing 50 copies of record for filing with the Court	3,781.53	
Petition and Brief of *Amici Curiae* before Court of Appeals	53.10	
Reply memorandum before Court of Appeals	63.35	
Brief and Supplement before Master	566.40	
Reply Brief before Master	294.50	
Brief before Court of Appeals	1,701.35	
Chronology and Index	209.39	6,669.62
		10,679.58

Carried forward.....		$10,679.58
3. Copies of documents necessarily obtained for purposes of the investigation.		
Transcript of United States vs. Davis, Kaufman and Fox (first trial)	$ 948.19	
Transcript of United States vs. Davis, Kaufman and Fox (second trial)	1,631.50	
Transcript of proceedings in In re Kaufman (disciplinary proceedings)	826.00	
Transcript of, Grand Jury proceedings introduced during In re Kaufman.....	259.50	
Copy of Master's Report in In re Kaufman	76.48	3,741.67
4. Witness fees paid by *Amici Curiae* comprising per diem $2.00 per day, subsistence $3.00 per day, and travel at 5 cents per mile:		
Marguerite H. Asselin....	15.00	
William Elmer Brown.....	7.50	
Eunice M. Cole.....	120.00	
J. Warren Davis (subpoenaed twice)	41.00	
W. L. Duncan	119.50	
W. C. Herrell	93.50	
Morgan Kaufman (subpoenaed twice)	63.00	
Thorne Lord	10.00	
Mary Mahoney	7.50	
W. L. Rogers	120.00	
Alma H. Steedle	10.00	
Hiram Steelman	7.50	
Charles L. Stokley (subpoenaed twice)	239.00	
Wilmer C. Stokley.....	115.25	968.75
		$15,390.00

Carried forward		$15,390.0
5. Paid for Exhibits Introduced Before the Master by *Amici Curiae*		
Exhibits 33 and 34	8.00	
Exhibits 40-55, inc.	36.50	
Exhibits 77 and 78	3.10	
Exhibits 107 and 108	4.00	
Exhibits 127-132, inc.	11.50	
Exhibits 137-141, inc.	10.00	
Exhibits 199 and 199A	17.60	
Exhibits 215A-215E	7.50	98.2
		$15,488.2

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

ROBERT W. POORE, being first duly sworn, deposes and says that the foregoing items truly and correctly state the disbursements paid by J. Bernhard Thiess and Thorley von Holst, *Amici Curiae*, on account of expenses, incurred during the course of the investigation ordered by the Court of Appeals for the Third Circuit on November 26 1941, which in the opinion of affiant are normally and properly taxable as costs.

ROBERT W. POORE

SUBSCRIBED and SWORN to before me this 24th day of July, 1944.

ANNE E. RYAN
Notary Public
My commission expires May 15, 1947

(Seal)

EXHIBIT C

ADDITIONAL EXPENSES AND DISBURSEMENTS OF AMICI CURIAE NOT INCLUDED IN EXHIBITS A AND B

May, 1941

Services of associate in investigating and reporting on proceedings in U. S. v. Davis et al.		$ 20.00	
Expenses of trip to Philadelphia	JBT	177.60	
Expenses of trips to Philadelphia and New York re Davis trial and proceedings before C. C. A. 3 relative thereto	TvH	428.05	
			$ 625.65

June, 1941

Proportionate share of expenses of trip to Philadelphia	JBT	61.80	
Expenses of Judge Denison on trips to Chicago and Philadelphia		130.56	
			192.36

August, 1941

Expenses of trip to Philadelphia on attendance at Judge Davis's criminal trial	JBT	248.80	
	TvH	269.60	

Services of Philadelphia associate in consulting Circuit Court of Appeals dockets and files as to appearance of Morgan S. Kaufman as counsel in certain cases ...		25.00	
			543.

December, 1941

Expenses of trip to Washington and Philadelphia on investigation and first hearing	JBT	132.45	
	TvH	150.84	
Expenses of Judge Denison on trips to Chicago and Philadelphia		96.18	
			379.

January, 1942

Expenses of trip to Philadelphia to attend Kaufman disciplinary proceedings and to examine papers in Master White's office	SN	158.00	
Expenses of trip to Philadelphia on hearing before Master White.....	TvH	135.79	
Expenses of trip to Philadelphia and New York	JBT	170.00	
			463.7

March, 1942

Expenses of trip to Philadelphia and attending at Master's office to examine records	JBT	135.12	
	SN	119.25	
To W. H. Mitchell, Clerk of U. S. District Court: Certification of docket entries in Tri-Ergon cases		5.15	
			259.52

April, 1942

Expenses of trip to Orlando, Tavares and Mt. Dora, Florida, on investigation of title to Stokley's Florida properties	RWP	163.92	
Expenses of trip to Philadelphia	TvH	103.25	
	SN	96.05	
Expenses of trip to Philadelphia and New York	JBT	134.05	
Services of Washington associate in obtaining certified copy of telegram sent by Clerk of Supreme Court to Thomas G. Haight concerning denial of Certiorari in Supreme Court cases Nos. 417-418		17.80	
			515.07

May, 1942

Expenses of trip to Philadelphia	JBT	161.01	
	SN	137.50	
	RWP	116.68	
Expenses of trip to Mt. Dora, Miami, Orlando, Eustis and Tavares, Florida to interview prospective witnesses Duncan and Herrell	SN	230.84	
	RWP	186.48	
Expenses of trip to Cleveland to interview prospective witnesses	JBT	43.25	
To cost of plat of Kaufman and Davis properties in Mt. Dora		15.00	
			890.76

June, 1942

Expenses of trip to New York and Wilmington interviewing prospective witnesses	JBT	139.66	
Services of New York associate on obtaining service of subpoenas		50.00	
			189.66

July, 1942

Expenses of W. L. Duncan in connection with Stokley's Florida property		25.00	
			25.00

August, 1942

Expenses of trip to Battle Creek, Mich. to interview Herrell, including cost of photostats obtained	RWP	61.69	
Stenographic services in typing testimony		424.82	
			486.51

September, 1942

Expenses trip to Philadelphia interviewing Judge Thompson	JBT	173.67	
Expenses trip to Philadelphia on hearing	JBT	211.01	
	TvH	135.79	
	SN	121.01	
	RWP	122.59	
Services of W. L. Duncan in Philadelphia		75.00	
Expenses of W. C. Herrell at Philadelphia		34.55	
Expenses and transportation for Ira Rubel, accountant, and JBT—trip to New York on investigation of Ungerleider's books, etc.	JBT	285.78	
Services of New York associate in locating and serving subpoenas on Lord and Ungerleider		50.00	
Cost of photostats of Stolley's deeds and other documents		80.60	
			1,290.00

October, 1942

To U. S. Marshal, Jacksonville, Fla.—Cost serving subpoenas		25.00	
Services and disbursements of associate in Orlando, Fla. re subpoena on Charles L. Stokley		14.73	
Stenographic services in typing testimony		87.65	
Expenses of trip to Philadelphia on hearing	JBT	329.01	
	TvH	340.79	
	RWP	274.54	
	SN	266.80	
			1,338.52

November, 1942

Services and disbursements of Orlando associate in obtaining hospital record of Stokley's son	12.24	
Services and disbursements of Washington associate in obtaining service of subpoena on Lt. Prevost	29.82	
Services and disbursements of New Orleans associate in connection with Ungerleider's records	130.90	
Services and expenses of William Elmer Brown	46.24	

Services of Philadelphia associate		25.00	
Expenses trip to Philadelphia on presentation of petition to take Fox's testimony	JBT	167.26	
	SN	135.26	
Expenses of trip to Philadelphia on hearing	JBT	138.79	
	TvH	108.79	
Expenses and services of New York associate in obtaining service of subpoenas in Trenton and Scranton		62.05	
			856.35
December, 1942			
Services of accountants in examining brokerage accounts of J. Warren Davis, Marguerite Davis and Morgan S. Kaufman		137.86	
To Herbert J. Walter, handwriting expert: Consultation on authenticity of Universal's voucher records		25.00	
Stenographic services in copying testimony		273.85	
			436.71
January, 1943			
Services and expenses of Washington associate		35.75	
Expenses of trip to New York to examine U. S. Attorney's files	SN	134.00	
			169.75

February, 1943

Services of New York associate re Charles L. Stokley		100.00	
Cost of photostats of additional papers in U. S. Attorney's Office		36.07	
			136.07

March, 1943

Services and disbursements of Orlando associate		9.71	
Expenses trip to Philadelphia for hearings	TvH	353.97	
	RWP	130.76	
Edwin H. Fearon, handwriting expert; consultation as to authenticity of Davis's account book		40.43	
Expense trip to Philadelphia for examination of Stokley documents	RWP	113.67	
Cost of additional photostats of Stokley papers		11.42	
Services and disbursements of Philadelphia associate		29.06	
Services and expenses of New York associate in obtaining service of subpoenas on Kaufman and Davis		70.48	

Services and disbursements of Miami associate in obtaining service of subpoena on Wilmer Stokley		225.00	
			984.50
April, 1943			
Expense trip to Philadelphia on hearing	JBT	128.97	
	TvH	109.82	
	RWP	99.90	
Court reporter—For copy of argument in *In Re Kaufman*		334.58	
Stenographic services in typing evidence		78.50	
			751.77
November, 1943			
Expenses of trip to Philadelphia to attend hearing before Court of Appeals ..	TvH	162.53	
	RWP	143.66	
To Philadelphia associate for professional services and expenses		57.07	
Stenographic services in checking record		331.50	
			694.76

February, 1944			
Draftsman's services preparing chart for brief		12.00	
Miscellaneous expenses incurred in preparation of brief		67.60	
			79.60
April, 1944			
Expenses of trip to Philadelphia on argument before Court of Appeals	JBT	185.82	
	TvH	170.44	
	SN	167.44	
	RWP	164.95	
			688.65
TOTAL			$11,997.87

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

ROBERT W. POORE, being first duly sworn, deposes and says that the foregoing items truly and correctly state the additional expenses and disbursements, not included in the items shown by Exhibits A and B, necessarily incurred and paid by Arthur C. Denison, J. Bernhard Thiess, and Thorley von Holst, *Amici Curiae*, preliminary to, and during the course of, the investigation ordered by the Court of Appeals for the Third Circuit on November 26, 1941.

ROBERT W. POORE

SUBSCRIBED and SWORN to before me this 24th day of July, 1944.

ANNE E. RYAN

EXHIBIT D

STATEMENT OF DAYS AND HOURS OF SERVICES OF AMICI CURIAE AND ASSOCIATED COUNSEL

1. Arthur C. Denison

		Days
1941	May and June	9
	July	½
	September, October and November	1
	December	2
	Total	12½ Days

2. J. Bernhard Thiess

		Hours
1941	May	52
	June	25
	July	12
	August	84½
	September	2½
	November	9
	December	48
1942	January	46
	February	25
	March	18
	April	67
	May	136
	June	148½
	July	94½
	August	75½
	September	119
	October	161½
	November	195
	December	81½

		Hours	
1943	February	12	
	March	95½	
	April	63	
	May	43½	
	June	4	
	July	70	
	August	46½	
	October	30	
	November	12½	
	December	21½	
1944	January	73	
	February	150½	
	March	115	
	April	91	
	Total		2,258½

3. Thorley von Holst

1941	May	78
	June	86
	July	59
	August	48
	November	7
	December	34
1942	January	53
	February	50½
	March	13
	April	38
	May	67
	June	106½
	July	80
	August	63
	September	53½
	October	181
	November	162
	December	154

		Hours
1943	February	25
	March	182½
	April	132
	May	43
	June	12
	July	115
	August	103
	October	58
	November	91
	December	89
1944	January	215½
	February	216
	March	88½
	April	98½
	Total	2,802½

4. Sidney Neuman

1941	April	1½
	May	8
	June	45
	July	22
	November	2
	December	14
1942	January	51
	February	24
	March	73
	April	130
	May	138
	June	111
	July	83½
	August	19
	September	56
	October	171
	November	165
	December	149

		Hours	
1943	January	19	
	February	2	
	March	78	
	April	94	
	May	70	
	June	5	
	July	114	
	August	91	
	October	36	
1944	January	199	
	February	156½	
	March	114½	
	April	88	
	Total		2,330

5. **Robert W. Poore**

1941	June	55½
	July	3½
	November	1
1942	March	21½
	April	56½
	May	139½
	June	120½
	July	109½
	August	101½
	September	62½
	October	176½
	November	137½
	December	40½
1943	January	4
	February	49½
	March	163½
	April	136

		Hours	
1943	(Cont'd.)		
	May	71½	
	June	3½	
	July	99½	
	August	74½	
	October	59	
	November	92½	
	December	11	
1944	January	173	
	February	139½	
	March	49½	
	April	71	
	Total		2,223½
	TOTAL HOURS		9,614½

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

ROBERT W. POORE, being first duly sworn, deposes and says that the foregoing exhibit truly and correctly states the days expended by Arthur C. Denison and the hours expended by J. Bernhard Thiess and Thorley von Holst, Amici Curiae, and by Sidney Neuman and Robert W. Poore, attorneys associated with them, in connection with the preparation for and participation in the investigation ordered by the Court of Appeals for the Third Circuit on November 26, 1941, and in the briefing and argument thereof before the Master and before the said Court, as shown by the books and records of the said *Amici Curiae*.

ROBERT W. POORE

SUBSCRIBED and SWORN to before me this 24th day of July, 1944.

ANNE E. RYAN
Notary Public
My commission expires May 15, 1947.

STATE OF ILLINOIS)
COUNTY OF COOK) ss.:

AFFIDAVIT OF SERVICE

I, ANNE E. RYAN, being duly sworn, depose and say that I am secretary to J. BERNHARD THIESS, attorney at law, with offices at 77 West Washington Street, City of Chicago, State of Illinois, and that on the 24th day of July, 1944, at or about 5:30 o'clock P. M., I deposited in the United States mail at the Post Office at Chicago, Illinois, with postage prepaid, envelopes addressed, respectively to—

Ralph S. Harris, Esq.,
100 Broadway
New York 5, New York

and

Robert F. McCracken, Esq.,
1421 Chestnut Street
Philadelphia 2, Pa.,

attorneys for the Universal Oil Products Company, each containing a copy of the attached and foregoing Motion and Exhibits "A" to "D", inclusive.

ANNE E. RYAN

SUBSCRIBED and SWORN to
before me this 24th day
of July, 1944.

EILEEN M. BRUCZYK
Notary Public
My Commission Expires June 27, 1945

(Seal)

EXHIBIT 17

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

Nos. 5546 and 5648.

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

Before BIGGS, MARIS, JONES, GOODRICH and MCLAUGHLIN, *Circuit Judges.*

Opinion of the Court

(Filed December 29, 1944.)

BIGGS, *Circuit Judge.*

The proponents of the motion *sub judice* ask this court to award them reasonable counsel fees for services rendered as *amici curiæ* performed at our direction and also seek reimbursement for out-of-pocket expenses. The fees sought are to compensate the movants and the estate of former Judge Arthur C. Denison.[1] The *amici* appeared in open.

[1]Judge Denison died after the commencement of the proceedings referred to in this opinion.

court, notice having been given to both the plaintiff and the defendant, and suggested that our judgments in the above entitled causes had been procured by the plaintiff by corrupting a former judge of this court. The *amici* stated that they no longer represented the defendant, which, following the judgments of this tribunal, had executed an agreement of settlement with the plaintiff, but appeared on behalf of certain other interests adversely affected by the judgments. We stated that if the movants filed a petition as *amici curiæ* embracing the allegations made by them, we would proceed in the premises as seemed warranted. A petition was presented. By an order entered November 26, 1941 the court appointed a master to hear the evidence and in effect directed the *amici* to proceed with the case.

An answer[2] was filed by the plaintiff. Hearings before the master began in June, 1941, and continued through April, 1943. The transcript of the proceedings, with exhibits, consists of more than thirty-five hundred printed pages. The *amici* or attorneys associated with them were compelled to make trips to Philadelphia, to New York, to Cleveland, to Battle Creek and to various points in Florida in order to interview numerous witnesses, to appear before the master and for various other purposes. After testimony was concluded, the *amici* argued the case before the master and prepared and filed briefs and requests for find-

[2]The plaintiff's answer did not oppose vacating the judgments but did deny exercising any corrupting influence on the court. Counsel for the plaintiff offered to argue the cases *de novo* before us and stated that the plaintiff would abide by the results of our decision. Jurisdiction, however, may not be conferred by consent, and if no corruption had been practiced this court would not have possessed the power to reopen its judgments or to recall its mandates after the end of the term.

ings of fact and conclusions of law. The master found in favor of the *amici* on the fundamental issue. Exceptions to the master's report were filed and *amici* prepared and filed a brief in this court. This consisted of over three hundred printed pages. The argument before this court consumed two days. After consideration we entered an order approving the master's report, set aside the judgments and recalled our mandates. Excluding from their respective computations all time expended by the *amici* and their office associates prior to the date of our order appointing the master, it appears that the *amici* and those associated with them expended a total of over nine thousand hours in the preparation, trial and argument of the case. The *amici* themselves expended approximately five thousand hours of work following the entry of the order of this court of November 26, 1941.

No agreement was made in advance of the completion of the work, nor could any be made, settling the compensation of the *amici*. What should their compensation be? As was said in In re Osofsky, 50 F. (2nd) 925, 927, by Judge Woolsey, "The elements to be considered in determining an attorney's fee were once most aptly summarized in evidence given on a reference by Honorable William G. Choate, formerly a judge of this court, and David B. Ogden, Esq., a well known lawyer of a generation ago.

"They laid down the following elements as being matters properly to be considered when the fees of an attorney have not been agreed on beforehand, but are to be fixed: (1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed

in meeting that situation. (4) The amount involved, because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing."

As was pointed out by Judge Woolsey, each case differs to some extent in respect to the importance of the several elements referred to.

The members of the court are agreed that the court has power to award the compensation for their services to the court, to be paid by the plaintiff, and that under the circumstances of this case the *amici* are entitled to be awarded reasonable compensation for those services. Our difference of opinion lies in the question as to what is reasonable.

Using the criteria referred to in the Osofsky case, we find that the movants and their two associates expended a total of nearly two years' working time on the case. The work required a high degree of skill and they employed it in presenting the necessary degree of proof and in the preparation and presentation of their arguments and briefs. Though the nature of some of the proof had been disclosed in part in previous criminal proceedings, this by no means solved the problems of evidence presented. Insofar as this court was concerned two matters of transcendental importance were involved, the honor of the court and the purity of its judicial processes. The *amici* aided the court in purging itself of two judgments affected with corruption. Without the services of the *amici* the judgments would stand today. The *amici* are members of the patent bar, eminent in their profession. Under all the circumstances we conclude that the sum of $100,000 suggested by them as the amount of their compensation is reasonable.

Accordingly *amici* and their associates will be allowed the sum of $100,000 as their reasonable compensation and the amount of $54,606.57 as reimbursement for their out-of-pocket expenses. The court will deduct from the sum sought for reimbursement the amounts shown upon Exhibits A, B and C to the motion, which total $1,361.41, comprised of items representing expenditures made by the *amici* prior to the date of the order appointing the master.

JONES, *Circuit Judge*, dissenting.

I am compelled to dissent with respect to the amount of compensation allowed by the court to the *amici curiae* for their professional services in connection with the proceedings which terminated in the vacation of this court's judgments of June 26, 1935, in the above entitled causes. I do not question the power of the court to award the *amici* compensation at the expense of the adverse litigant. Nor do I say that they are not entitled to some compensation. But, I do insist that their services are not to be evaluated on the basis of the time and effort expended and the results obtained at a rate of pay which they might charge and have a reasonable right to expect from private clients for comparable services.

The *amici* themselves asked us to create their status as such in these cases. Having thus volunteered to bring the subject matter officially to our attention for our appropriate action (after the underlying fault of the impeached judgments had been disclosed by official investigations and court trials to which the *amici* were not party), it is not a little surprising to me that they should now presume to ask of

us an award of compensation on the basis of the value of their services to clients interested in the private aspects of the litigation.

The fact that Universal, against which the fees are to be charged, perpetrated a fraud on this court in obtaining its earlier judgments is immaterial to our present problem. These proceedings do not call for the imposition of penal sanctions and, particularly, not for the pecuniary benefit of counsel who participated therein as friends of the court. Our question is as to how much a court may in good conscience award to *amici* for their services to the court and not what those services would be worth to private clients. As members of the bar of this court, the *amici* can have little less interest than the court itself in purging its records of wrongs,—an obligation which these *amici*, being highly reputable counsel, must have well understood when they proffered their services. They are to be thought of as having primarily acted *pro bono publico* of their own volition. In no event, can it be said that the court independently imposed upon them a wholly unfamiliar task.

But, we did independently choose and appoint a Master to conduct the proceedings and to make findings and recommendations to the court. The Master discharged the duties of his office with marked ability. After lengthy hearings and a careful and painstaking study of the evidence and the pertinent law, the Master prepared and filed a complete report upon which this court was able to act finally without taking further testimony or making any additional findings. For all of that service, which certainly consumed as much of the Master's valuable time and effort as the *amici* could justifiably have spent on the case, we awarded the Master a fee of twenty-five thousand dollars which, by the way, was

his own suggestion as to just compensation for his services. I have seen nothing that would prompt me to conclude that these *amici* are entitled to any greater sum for their services to the court.

Judge Maris has authorized me to state that he joins in this dissent.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

EXHIBIT 18

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY,
Defendant-Appellant,

vs.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

BEFORE BIGGS, MARIS, JONES, GOODRICH AND MCLAUGHLIN, *Circuit Judges.*

Order

AND NOW, to wit, this 29th day of December, 1944, it is

ORDERED that J. Bernhard Thiess and Thorley Von Holst, Esquires, *amici curiae,* be and they hereby are allowed the sum of $100,000 as compensation for their services in the above entitled cause; and it is

FURTHER ORDERED that the expenses of the *amici curiae,* as shown by the exhibits to their motion filed herein on July 26, 1944, be and they hereby are allowed in the sum of $54,606.57 (viz.: the total of the sums shown upon Ex-

hibits A, B and C to the motion, less amounts totalling $1,361.41, composed of items under dates of May, June and August, 1941); and it is

FURTHER ORDERED, that the sum of $154,606.57 be and the same hereby is taxed against Universal Oil Products Company together with the costs of the proceedings in this Court to set aside the judgments rendered by this Court in the above entitled causes on June 26, 1935.

For the Court

(sgd.) JOHN BIGGS, JR.
United States Circuit Judge.